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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~600~~ 401

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THOMAS R. MARSHALL, AS GOVERNOR OF THE STATE  
OF INDIANA, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN T. DYE.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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FILED DECEMBER 19, 1912.

(23,465)





( 23,465 )

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OCTOBER TERM, 1912.

No. 890.

THOMAS R. MARSHALL, AS GOVERNOR OF THE STATE  
OF INDIANA, ET AL., PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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1 STATE OF INDIANA.

*In the Supreme Court:*

Be it remembered that heretofore, to-wit: On the 11th day of November, 1911, the same being the 150th Judicial Day of the May Term, 1911, of said Supreme Court, Lew G. Ellingham, Secretary of State for the State of Indiana, Thomas R. Marshall, Muter M. Bachelder, and Charles O. Roemler, composing the State Board of Election Commissioners of the State of Indiana, by their Attorneys, Roby & Watson, Stotsenburg & Weathers, Thomas Homan and Stuart, Hammond & Simms, filed in the office of the Clerk of the said Supreme Court of said State of Indiana, a transcript of the record and proceedings had in the Marion Circuit Court (20079), of said State of Indiana, in a cause wherein Lew G. Ellingham, et al, were the Appellants, and John T. Dye was the Appellee, together with an assignment of errors (4) and bond, which said transcript is in the words and figures following, to-wit: (H. L.),

2 Be it remembered, That among the records of the Circuit Court of Marion County, Indiana, are the following in the cause of

No. 20079.

JOHN T. DYE, Plaintiff,

vs.

LEW G. ELLINGHAM, Secretary of State for the State of Indiana; Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler, Composing the State Board of Election Commissioners of the State of Indiana, Def'ts.

Be it further remembered, That heretofore towit: On the 1st day of May, 1911, the above named plaintiff, by counsel, filed in the office of the clerk of said Court, a complaint against the said defendants, which complaint is as follows:

Filed Nov. 11, 1911. J. Fred France, Clerk.

3 STATE OF INDIANA.

*County of Marion, ss:*

In the Marion Circuit Court, May Term, 1911.

Cause No. —.

JOHN T. DYE, Plaintiff,

vs.

LEW G. ELLINGHAM, Secretary of State for the State of Indiana; Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler, Composing the State Board of Election Commissioners of the State of Indiana, Def'ts.

*Complaint.*

The above named plaintiff, complaining of the above named defendants says: That Lew G. Ellingham is the Secretary of State for

the State of Indiana, and that Thomas R. Marshall, because he is governor of the State of Indiana, and Muter M. Bachelder and Charles O. Roemler, defendants herein, compose the State Board of Election Commissioners for the State of Indiana, the said Bachelder and the said Roemler, being two qualified electors of this state and being heretofore duly appointed by the governor of the State as members of the State Board of Election Commissioners. And that the said commissioners each will hold their respective membership upon and in said board until their successors shall have been appointed and qualified in manner and form as provided by law.

4 Plaintiff says that he is a male citizen of the United States and over the age of twenty-one years and has resided in the State of Indiana more than forty years continuously next before this date; and that he now resides and for many years has resided and will continue to reside in Washington township, in Marion County, in the State of Indiana. That he has been during all the time of his citizenship in the State of Indiana and now is a taxpayer in said county and an elector, and will be entitled to vote in said township and county at the next general election to be held on the first Tuesday after the first Monday in November, 1912.

And plaintiff brings this suit for himself and also for all the electors and for all the taxpayers in the State of Indiana.

Plaintiff says that the said Secretary of State is required by the statutes thereof in such case made and provided that whenever any proposed constitutional amendment or other question is by law to be submitted to the people of the State for popular vote at any election to duly and within the time in the statute provided, viz., thirty days before election, certify and at the expense of the state transmit such certificate and instrument to the clerk of each county in the state (2 Burns 6908) for the purpose that such amendment

5 or other question may be included in the public notice of the election required by law to be given for the same time and in the manner provided by statute in the counties and precincts in the state. Plaintiff further says that it is provided by the statutes of this state that whenever any constitutional amendment or other question is required by law to be submitted to the popular vote of all the electors of the state at any general or other election for such purpose, the State Board of Election Commissioners shall cause to be printed and provided and distributed to the several voting precincts throughout the State a statement of such questions upon the state ballots and upon the sample ballots and in such way and manner as that every elector may indicate his preference for or against any one or more constitutional amendments, and as in favor of or objecting, to any other question of fact so submitted to the popular vote of the electors of the state at such election. Plaintiff states that the expenses incident to submitting a constitutional amendment or amendments or any other question of fact to the electors in each voting precinct are paid out of the public funds raised by taxation upon the property and polls of the electors and of the people of the state, including the expenses for providing

ballots of every kind so as to enable the electors to vote for or against any proposed amendment, or amendments or upon any other question of fact, and providing tally sheets for recording the votes on such amendment or amendments or other questions of fact and other and proper papers for the certification for the same to the secretary of state to be tabulated and compiled in manner and form as provided by law. The total expenses accruing on the submission to the people of this proposed new constitution, hereinafter set forth would aggregate a large sum of money payable out of the public funds and to be raised by taxation from the property of plaintiff and other property holders within the state.

Plaintiff states that at the 67th regular session of the general assembly of the state of Indiana a certain act was introduced and passed, to-wit: Chapter 118, as printed in the Acts of 1911 at page 205 et seq., which act is called in the title

"An Act to submit to the voters of the state of Indiana at the general election to be held on the first Tuesday after the first Monday in November, 1912, a new constitution."

That it is provided among other things in said act that all election officers and other officials required by law to perform any duties with reference to general elections shall perform like duties with reference to the submission of the said so-called proposed new constitution to the people for adoption or rejection, thereby making it the duty of the said Ellingham, the secretary of state, to certify to the clerk of each county in the state within the time provided and before the election in 1912 the question to be submitted to the

people of the state for popular vote at said election whether the said proposed "new constitution" shall be adopted or rejected by the people as set forth in said chapter. And it also will be and is made the duty of the State Board of Election Commissioners and their successor or their successors on said State Board of Election Commissioners to cause a statement of the submission of the said so-called new constitution to be printed at the expense of the state on the state ballots and sample ballots to be prepared by the said commissioners and distributed to each and every precinct in the state for the use of the voters in all the precincts of the state at said election to be held in the year 1912 as aforesaid, so that this plaintiff and every other elector in the state may at said general election indicate his preference as to the adoption or rejection of the said so-called and proposed "new constitution."

Plaintiff says that the governor of the State of Indiana on the 21st day of April, 1911, issued and published his official proclamation in manner and form as required by the statute announcing that on said day the acts and laws passed at the 67th regulation sessions of the general assembly of the state of Indiana were in full force and effect throughout the state.

Plaintiff says that the said act, being said Chapter 118, is unconstitutional, null and void for the following and many other reasons:

1. The instrument made and set forth in said Chapter 118 and



therein required to be submitted to all the voters of the state at the general election to be held upon the first Tuesday after the first Monday in the month of November, 1912, for adoption or rejection and called in said chapter a "proposed new constitution" is, and the said act is, null and void because that the said general assembly sitting in the year 1911, and being the 67th regular session of the general assembly of the state of Indiana, had no legislative or other power under the present constitution of this state to frame or to submit to the people said instrument in manner and from as therein set forth. And so the said act is unconstitutional, null and void.

2. The proposed amendments set forth in the said so-called "new constitution" embodied in said act and being said Chapter 118 were not with the ayes and nays thereon entered on the journals of the house and senate of said general assembly as by the constitution required, nor were they referred to the general assembly to be chosen at the next general election, to be held in 1912, as required by section 1 of article 16 of the existing constitution of the state of Indiana. And so the said act is unconstitutional, and void.

3. The said instrument framed by the legislature and embodied in the said Chapter 118 and therein called a "proposed new constitution" is not in truth and fact a new constitution, but is in truth and fact the present constitution of the state of Indiana with certain amendments made thereto and more particularly described and indicated as follows:

First. Section 12 of the Bill of Rights is amended so as to provide that the general assembly may enact a workmen's compulsory compensation law.

Second. Section 2 of article 2 is amended so as to require every voter to pay a poll tax for two years previous to any election; and also by striking out the clause in the present constitution giving alien born persons who have declared their intention to become citizens of the United States the right of suffrage.

Third. Section 4 of article 2 is amended so as to provide that if any person is absent from the state for any cause other than on business of the state or the United States for a period of twelve months shall lose his residence unless he files with the clerk of the circuit court, a written declaration to the contrary.

Fourth. Amending section 2 of article 4 so as to provide that the house of representatives shall not exceed 130 members.

Fifth. Amending section 4 of article 4 so as to provide that each county without regard to population shall have one representative in the house of representatives and some larger counties a small quantum of additional representation.

Sixth. Amending section 9 of article 4 so as to provide that the general assembly may sit not exceeding 100 days. And special sessions shall not sit longer than 30 days, and consider only the specific purposes named in the governor's proclamation therefor.

Seventh. Amending section 19 of article 4 so as to provide that

the legislature need not express the subject of any act in the title but may give a brief and comprehensive name to the act.

Eighth. Amending section 22 of article 4 by adding that the general assembly may adopt special charters for the different cities of the state.

Ninth. Amending section 14 of article 5 so as to require a three-fifths' vote of each house of the general assembly to pass a bill over the governor's veto; and may veto any part of an appropriation bill.

Tenth. Amending section 1 of article 6 so as to provide that all state officers except judges shall be elected and hold their offices for four years; and also amending section 2 of said article so as to provide that all county officers shall be elected and hold their offices for four years. And amended section 11 of article 7 so that prosecuting attorneys shall hold their offices for four years.

Eleventh. Amending section 2 of article 7 so as to provide the supreme court may consist of not more than eleven judges.

Twelfth. Amending section 20 of article 7 so as to provide that the general assembly may adopt laws providing for the initiative, referendum, and recall both of state and local application.

11 Thirteenth. Amending section 21 of article 7 so as to read the same as the constitutional amendment now pending on the same subject.

Fourteenth. Amending section 1 of article 15 providing that the legislature shall not choose any officers except its own and United States senators, nor increase the salary of any officer during his term.

Fifteenth. Amending section 1 of article 16 so as to provide that the constitution may be amended when such amendment is once agreed to by a majority of the members of both houses and be then submitted to the people; but no new constitution (other than this) shall be submitted to the people until by virtue of an act of the general assembly a majority of the legal voters of the state have declared in favor of a constitutional convention.

There are a few other immaterial amendments made to some other sections of the present constitution. But the said "proposed new constitution" consists only in changes by additions to or eliminations from existing sections by way of amendments to each as named; and being a series of amendments within the true intent and meaning of section 16 of the existing constitution.

4. No provisions is made in said Chapter 118 for the electors of the state to vote for, or against, each separate amendment separately as required by section 2 of article 16 of the present constitution, but under section 2 of said act, the plaintiff and all the other electors of the state in voting at the general election to be held in the year 1912 are required to vote "for or against the new constitution" as a unit.

5. It is provided by section 2 of said act that any political party may declare in favor of said proposed new constitution, in which case it shall be the duty of the State Board of Election Commissioners to prepare the ballot for that party ticket accordingly; but no provision

is made in said act whereby an elector belonging to any political party declaring in favor of said proposed new constitution may vote against the said new constitution as a whole or a part. No provision is made for the preparation of a ballot for any party ticket which party shall not declare in favor of the new constitution. And no provision is made that a voter being a member of any party declaring in opposition to said "new constitution" can vote in favor of the said proposed constitution in whole, or in part. And so said act is unconstitutional and void.

6. Plaintiff further says there are many electors in the state of Indiana and will be at the next general election who do not belong to and *or* not members of any political party—and that no provision is made in said section two of said act for such an elector, commonly called an "independent" voter, for voting either for or against the

13      proposed constitution in its entirety, or in favor of some of the amendments proposed, and against other of the amendments proposed, or in favor of some articles in the said new constitution and against other articles in the same, or in favor of some sections in said new constitution and against other sections in the same. And so said act is unconstitutional and void.

7. Said chapter 118 is unconstitutional and void because it is sought to enact by and in section 2 of said act that no elector not a member of some political party shall have the right to vote at the next general election "for or against the new constitution," thereby denying to great numbers of electors throughout the state the right to vote for or against the "new constitution" either in whole or in part. And so the said act is illegal, as well as unconstitutional and void.

8. The present constitution of this state declares "All elections shall be free and equal." Art. 2, sec. 1. Thereby every elector at every general or other state election has the free and equal right to vote for or against any amendment to the constitution, or the adoption or rejection of any new constitution lawfully submitted to the people of the state for adoption or rejection.

The said act does not give to each elector the free and equal right to vote at the election at which said "proposed new constitution" is to be submitted to all the legal voters of the state to be held on  
14      the first Tuesday after the first Monday in the month of November 1912, because section 2 provides only for electors voting who may belong to some political party.

9. It is provided in the fourth Amendment to the Constitution of the United States that every state in this Union shall provide and maintain a republican form of government. The present Constitution of this state does so provide. But the proposed "new constitution" (Art. 7, sec. 20) provides that "on the petition of twenty-five per centum of the qualified electors of the state at the last general election the general assembly may adopt laws providing for the initiative, referendum and recall both of state and local application."

Such a form of government as described in said "new constitution" would not be a republican form of government as required by the Constitution of the United States. And so said act is null and void.

10. The so-called new constitution proposes that the house of representatives thereunder shall consist, first of one member from each of the ninety-two counties of the state, and, second of additional members at the pleasure of the legislature not exceeding thirty-eight and that if the membership of the house shall be increased by the legislature above ninety-two, then the counties entitled to additional representatives shall be ascertained by dividing the total population of the state as shown by the national census by the number  
 15 92. And only such counties shall have the benefit of any part of such additional representation in the house as have a population of two and one-half times the quotient thus ascertained. So that a county having a small population is given one member and other counties having twice or more the population but less than the arbitrary quota have no increased representation. And so said provision is contrary to the law of the land which secures to every citizen and elector as nearly as may be equal representation in the general assembly.

11. A republican form of government means among other things a legislature wherein each citizen shall have equal representation as nearly as may be and each voter an equal voice in choosing the members of the legislature of the state. The new constitution proposes a flagrant violation of this fundamental requisite of equal representation in that:

First. The members of the house are to be one representative from each county, and whether there shall be more is left to the legislature to determine.

Second. If the legislature determines there shall be a greater number, then it shall not exceed 130. And the excess over ninety-two, shall be apportioned among the counties only having more than two and one-half times the 1/92d part of the whole population. Such a method is a flagrant violation of the fundamental rule of equal representation in the legislature, is anti-republican;  
 16 and in violation of the Constitution of the United States and of the provisions of article 4 of our present state constitution, and contrary to representative government. And so said act is unconstitutional and void.

12. It is provided by article 16 of the present constitution of the state of Indiana that an amendment or amendments to said constitution can only be made in the manner in said article provided, — that is to say, any amendment or amendments to this constitution must be proposed first in either branch of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall with the ayes and nays thereon be entered on their journals, and referred to the general assembly to be chosen at the next general election; and if in the general assembly so next chosen such proposed amendment shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the of the general assembly to submit such amendment or amendments to the electors of the state. And it is further provided in section two of said article that if two or more amendments shall be submitted at the

same time they shall be submitted in such manner that the electors shall vote for or against each of said amendments separately; and that while an amendment or amendments agreed upon by one general assembly shall be awaiting the action of a succeeding

17 general assembly or of the electors no other constitutional amendment or amendments shall be proposed. And plaintiff states the fact to be that a joint resolution was adopted by the general assembly of the state of Indiana for the year 1903 and by the general assembly of the state of Indiana for the year 1905, entitled "A joint resolution to amend section 21 of article 7 of the constitution of the state of Indiana." That the said joint resolution was when and as agreed upon by a majority of the members of each house of the general assembly elected to each of the two houses sitting in the year 1903, with the ayes and nays thereon entered on the journals of both houses composing said general assembly and referred by that general assembly to the general assembly chosen at the general election in the year 1904 for the session of the general assembly sitting in the year 1905. And that during the session of the said last named general assembly the said joint resolution for said proposed amendment was agreed to by a majority of all the members elected to each house and by that general assembly submitted to the electors of the state at the general state election held in the year 1906. And at said last mentioned general election in 1906 more votes were cast in favor of said amendment than against the same, but a majority of all the voters voting at said general election did not vote in favor of said amendment. And thereupon at the next ensuing general assembly sitting in course in the year 1907,

18 a joint resolution was adopted by each house of said general assembly that the said proposed amendment be and the same was then agreed to and referred to the electors of the state of Indiana at the next general election in course, which election was held in the year 1908 at which election more votes were cast in favor of said amendment than against it, but those in favor were less than a majority of all the electors voting at said election. And thereupon in the next general assembly in course sitting for the year 1909, Senate Joint Resolution No. 2 was adopted February 27, 1909, being Chapter 190 of the Acts of 1909 (Page 501) whereby said last mentioned general assembly again agreed to the said joint resolution for the amendment to said article of the constitution and again referred to the electors of the state at the next general election in course, which was held on the — day of November, 1910, at which last mentioned election more votes were cast in favor of said proposed amendment than against the same, but a majority of the electors voting at said last mentioned election did not vote in favor of said amendment and so the same is still pending and awaiting the action of a succeeding general assembly and the electors of the state as provided by the constitution as aforesaid. And while the same is so awaiting the action of the electors of the state not other constitutional amendment or amendments can be proposed to the constitution; wherefore,

19 the said Chapter 118 of the acts of the general assembly of 1911 is unconstitutional and void.



And plaintiff says that unless restrained by an order and judgment of this court the said Ellingham as secretary of state for the State of Indiana, will more than thirty days before said election certify to the clerk of each county in the state the proposed new constitution, and the question whether the same shall be adopted or rejected by the electors to the end that the clerk of each county shall include the same in the publication of notices of such election as provided by law. And that the State Board of Election Commissioners, and their successor or successors, will undertake to print upon the ballots required by them to be printed and distributed throughout the state provision touching the adoption or rejection of the said so-called proposed new constitution in pursuance of the said Chapter 118 of the Acts of 1911, of the General Assembly of the State of Indiana, and without authority of law and contrary to the constitution of the state. And the various election officers of the state in obedience thereto will incur large expenses to be paid out of the funds raised and to be raised by taxation of plaintiff and the other citizens of the state to pay the costs of such election for or against the "proposed new constitution" thereby unlawfully using the public funds of the state, and the municipalities of the state for an unlawful purpose.

20 And plaintiff states that he brings this action for the benefit of himself as a citizen, elector and *and* taxpayer, in the state of Indiana, and also on behalf and for the benefit of all the other citizens electors, and taxpayers in the state. He says that the defendants purpose, publish, and declare and will unless restrained, unlawfully expend and cause to be expended large sums of money to be raised by taxation from the property and polls in the state in defraying the costs and expenses of such election and in preparing for carrying out and returning the election for or against said new constitution as in the act stated; that the expenditure of said sums of money is wholly unauthorized by law because the said act is unconstitutional, null and void, and by law there can be no election held on said new constitution.

Plaintiff further says that on holding said election, and if at the same a majority of votes cast should be in favor of the new constitution and without the judicial adjudication of the validity of said act, great confusion would arise throughout the state as to whether the new constitution or the present constitution was the constitution of the state, greatly to the injury of the plaintiff and the other people of the state. And that there would necessarily arise many legal questions of wide and general interest and importance affecting the property and personal rights of plaintiff and the people at large,

21 among which may be named: as to the number of representatives in the house, the qualifications of electors, the duration of the terms of offices of the state officers and county officers, and the like, and the salaries of the members of the legislature and other person, and many other questions necessarily leading to a great multiplicity of suits throughout the state, giving rise to many complications and controversies and disturb and unsettle the peace and security of the people and the state government; and bring

about a great expenditure of public moneys raised by taxation on the property of plaintiff and other taxpayers, and vexatious law suits, touching the rights of the plaintiff and of the people of the state. And so to prevent these wrongs and injuries to himself and other electors and taxpayers of the State, the plaintiff brings this suit for himself and also one-half of all the people of the state. And plaintiff further says that he himself and all the electors and other citizens of the state have the right to have it determined, decided, and adjudicated and published by the courts so as to know before the election provided for in said act whether the said act is a constitutional exercise of the legislative power of the general assembly and whether if adopted, said "new constitution," would be valid or void. And plaintiff says that if adopted the same would be void. And he further says that each and every act of each and every defendant required to be done by said Chapter 118 as therein or herein described would be and is illegal and unauthorized, and when and if done will be to the injury of the plaintiff and to the injury of each of the electors and taxpayers in the state. And he says that he has no other relief nor have the other electors and taxpayers and other relief, except by this suit.

Wherefore, He sues and prays judgment that said Chapter 118 be held unconstitutional, null and void; and that the defendants, and each of them and their successors in office, and each of them, be enjoined forever from doing any act or acts or thing or things as required to be done by said act or as herein described, and that they be enjoined from taking any steps to submit said proposed new constitution to the people for adoption or rejection as by the said act provided. And plaintiff prays for any and all further and proper relief in the premises and that he may have judgment for his costs.

JNO. T. DYE,

RALPH K. KANE,

ADDISON C. HARRIS,

*Att'ys for Pl'ff.*

23 And afterwards to-wit: On the 17th day of May, 1911, being the 15th judicial day of the May Term, 1911, of said Court, before the Hon. Charles Reuster, Judge thereof the following proceedings were had, viz:

*Appearances—Rule to Answer.*

Come Thomas H. Honan; Stuart, Hammond and Simms; Stotsenburg and Weathers; Roby & Watson — enter their written appearance in this cause for the defendants, and now on motion said defendants are ruled to answer the complaint herein May 29th, 1911.

STATE OF INDIANA,

*County of Marion, ss:*

In the Marion Circuit Court, May Term, 1911.

No. —.

JOHN T. DYE, Plaintiff,

vs.

LEW G. ELLINGHAM, Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Defendants.

Come the defendants, Lew G. Ellingham, Secretary of State for  
the State of Indiana, Thomas R. Marshall, Muter M. Bachelder,  
Charles O. Roemler, composing the State Board of Election Com-  
missioners of the State of Indiana, by their attorneys, Thomas  
24 M. Honan, Attorney General for the State of Indiana, Stuart,  
Hammond & Simms, Stotsenburg and Weathers, and Roby &  
Watson, and hereby enter their appearance in the above entitled  
cause.

THOMAS M. HONAN, *Att'y Gen.:*

STUART, HAMMOND & SIMMS,

STOTSENBURG AND WEATHERS,

ROBY & WATSON,

*Attorneys for Defendants.*

And afterwards to-wit:—On the 20th day of May 1911, being the  
18th judicial day of the May Term 1911, of said court, before the  
same Hon. Court thereof the following proceedings were had herein  
viz:

Come the parties and defendants file motion to require attorneys  
for plaintiff to show authority under which they appear as such at-  
torneys in this action which motion is as follows:

25 STATE OF INDIANA,

*County of Marion, ss:*

In the Marion Circuit Court, May Term, 1911.

No. —.

JOHN T. DYE, Plaintiff,

vs.

LEW G. ELLINGHAM, Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Defendants.

*Motion to Require Plff's Att'ys to Show Authority to Act for All the  
Electors and Taxpayers.*

The defendants move the Court to require John T. Dye, R. K.  
Kane and A. C. Harris, attorneys for the plaintiff in the above enti-

tled cause, to produce and prove the authority under which they appear for "all the electors and for all the taxpayers in the state of Indiana," and for "all the people of the state," and "for all the electors and other citizens of the state."

THOMAS M. HONAN, *Att'y Gen.*;  
STUART, HAMMOND & SIMS,  
STOTSENBURG & WEATHERS,  
ROBY & WATSON,  
*Att'ys for Defendants.*

26 And afterwards to-wit:—on the 24th day of May 1911, being the 21st judicial day of the May Term 1911, of said Court, before the same Hon. Judge thereof the following proceedings were had herein viz:

*Motion to Require Att'ys to Show Authority Overruled.*

Come the parties and the Court having considered defendant's motion to require the attorneys of plaintiff to show authority under which they appear as such overrules the same, to which ruling the said defendants except, and now on motion defendants are ruled to answer the complaint herein, May 29, 1911.

And afterwards to-wit: on the 29th day of May 1911, being the 25th judicial day of the May Term, 1911 of said Court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

Come the parties and defendants file answer to complaint in general denial as follows:

STATE OF INDIANA,

*County of Marion, ss:*

In the Circuit Court of Marion County, May Term, 1911.

No. 20079.

JOHN T. DYE

vs.

LEW G. ELLINGHAM et al.

*Answer of Defendants.*

The defendant herein for answer to the plaintiff's complaint say that they deny each and every allegation therein contained.

T. M. HONAN, *Att'y Gen.*;  
STUART, HAMMOND & SIMMS,  
STOTSENBURG & WEATHERS,  
ROBY & WATSON,  
*Attorneys for Defendants.*

And afterwards to-wit: on the 15th day of June, 1911, being the 10th judicial day of the June Term, 1911, of said Court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

*Request for Special Finding of Facts.*

Come the parties and defendants file a request that the court make a special finding of facts, and state conclusions of law thereon, at the conclusion of the trial of this cause, which request is as follows:

STATE OF INDIANA,

*County of Marion, ss:*

In the Circuit Court of Marion County, June Term, A. D. 1911.

No. 20079.

JOHN T. DYE

vs.

LEW G. ELLINGHAM et al.

The defendants request the Court to find the facts in the above entitled cause specially, and to state his conclusions of law thereon.

STUART, HAMMOND & SIMMS,

STOTSENBURG & WEATHERS,

T. M. HOXAN,

ROBY & WATSON,

*Attorneys for Defendants.*

28 And afterwards to-wit:—on the 19th day of June 1911, being the 13th judicial day of the June Term, 1911, of said Court, before the same Hon. Judge thereof, the following proceedings were had, herein viz:

*Deposition of Merrill Moores Published.*

Come the parties and on motion of plaintiff the deposition of Merrill Moores is published by order of Court, and thereupon, this cause being at issue, is submitted to the Court for trial finding and judgment, and the Court having heard all the evidence adduced and having heard part of the arguments of counsel, continues the same for the further hearing of argument.

*Cause Submitted for Trial.*

And afterwards to-wit: on the 20th day of June 1911, being the 14th judicial day of the June Term, 1911, of said Court, before the same Hon. Judge thereof, the following proceedings were had, herein viz:



*Continuance.*

Come the parties and the court having heard additional arguments of counsels, continues the further hearing thereof.

And afterwards to-wit: on the 21st day of June, 1911, being the 15th judicial day of the June Term, 1911, of said Court, before the same Hon. Judge thereof, the following proceedings were had, herein viz:

Come the parties and the Court having heard additional argument, continues the further hearing thereof.

29 And afterwards to-wit: on the 22nd day of June, 1911, being the 16th judicial day of the June Term, 1911, of said Court, before the same Hon. Judge thereof, the following proceedings were had, herein viz:

Come the parties and the court having heard additional argument in the cause, continues the further hearing thereof.

And afterwards to-wit:—on the 23rd day of June, 1911, being the 17th judicial day of the June Term, 1911, of said Court, before the same Hon. Judge thereof, the following proceedings were had, herein viz:

Come again the parties and the argument of counsel herein being concluded the court takes this case under advisement.

And afterwards to-wit: On the 6th day of October, 1911, being the 5th judicial day of the October Term, 1911, of said Court before the same Hon. Judge thereof, the following proceedings were had herein, viz:

*Court Files Special Finding.*

"Come again the parties by their respective counsel. And the court now files its Special Findings of Fact, and its conclusions of Law thereon in the words and figures following:

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No. 20079.

JOHN T. DYE

vs.

LEWIS, G. ELLINGHAM et al.

The defendants, before the commencement of the trial herein, having filed a written request for the Court to make a special finding of the facts and state conclusions of law thereon, the Court does now make and file the following special finding of facts and conclusions of law thereon.

*Special Findings.*

The Court finds the facts as follows:

1. That John T. Dye, the plaintiff, is a natural born male citizen of the United States; that he now resides, and for more than fifty years last past has resided in Marion County, State of Indiana; that for five years last past he has resided, and still resides in Washington Township in said County, and is an elector in said Township, county and state, and a qualified voter therein and at the next general State election will vote at the Broad Ripple precinct in said township, county and state. That said John T. Dye is now, and has been during said time, a property holder and tax payer in said county and state, and is such in said Washington township, and in the year 1910 paid taxes on property theretofore assessed therein aggregating the sum of \$418.44 and was assessed for taxation in the year 1910 upon property therein values at \$24,840.00. That in the year 1911 his said assessment for taxes in said township is substantially the same in amount.

2. That at the regular session of the general assembly of the State of Indiana for 1911 a certain Act described in Plaintiff's complaint was duly passed which said act was known as Senate Bill No. 407; that said act was in all respects duly passed by the House of Representatives, and the Senate of said general assembly, and the same was duly signed by the Speaker of the House of Representatives and the President of the Senate; that said act was thereafter duly presented to Governor of the State of Indiana and by him approved on the 4th day of March, 1911, and was duly published in the acts of said general assembly as Chapter No. 118; that on the 21st day of April, 1911, the Governor of the State of Indiana issued his official proclamation declaring that said acts of said session of said general assembly were in force in the State of Indiana; And said act was in force in said State from and after said date, which said act is in the words and figures following, to-wit:

*Chap. 118 of the Acts of the General Assembly, 1911.*

## "Chapter 118.

An Act to submit to the voters of the State of Indiana at the general election to be held on the first Tuesday after the first Monday in November, 1912, a new constitution permitting the same to be adopted or opposed by any political party, and if so adopted or opposed, providing the method in which the same shall become a part of the party ticket, providing for the canvass  
 32 of the votes and the proclamation of the governor announcing its adoption or rejection, and other matters connected therewith.

(S. 407, Approved March 4, 1911.)

*Constitution of the State of Indiana.*

## Submission to Voters.

SECTION 1. Be it enacted by the general assembly of the State of Indiana, That at the general election to be held upon the first Tuesday after the first Monday in the month of November, 1912, there shall be submitted to all the legal voters of Indiana, for adoption or rejection, the following proposed new constitution:

## Preamble.

To the end that justice be established, public order maintained, and liberty perpetuated, we, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of Government do ordain this constitution.

## ARTICLE 1.

*Bill of Rights.*

SECTION 1. We declare that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the people; and that all free governments are,  
 33 and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

## Right of Worship.

SEC. 2. All men shall be secured in their natural right to worship Almighty God according to the dictates of their own consciences.

### Freedom of Thought.

SEC. 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinion or interfere with the rights of conscience.

### No Preference to Creed.

SEC. 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent.

### No Religious Test.

SEC. 5. No religious test shall be required as a qualification for any office of trust or profit.

### No Money for Religious Institutions.

SEC. 6. No money shall be drawn from the treasury for the benefit of any religious or theological institution.

### Competency of Witness.

SEC. 7. No person shall be rendered incompetent as a witness in consequence of his opinion on matters of religion.

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### Oath—How Administered.

SEC. 8. The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered.

### Free Speech and Writing.

SEC. 9. No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right every person shall be responsible.

### Libel—The Truth In.

SEC. 10. In all prosecutions for libel, the truth of the matters alleged to be libelous may be given in justification.

### Unreasonable Search or Seizure.

SEC. 11. The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable search or seizure shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

### Courts Shall be Open.

SEC. 12. All courts shall be open; and every man, for injury done him in person, property or reputation, shall have remedy by due course of law; but the general assembly may enact a  
35 workman's compulsory compensation law for injuries or death occurring in hazardous employment. In enacting such law, the general assembly shall have the right to define hazardous employment. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

### Rights of Accused.

SEC. 13. In all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process for obtaining witnesses in his favor.

### No Person Twice in Jeopardy.

SEC. 14. No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself.

### Unnecessary Rigor Prohibited.

SEC. 15. No person arrested, or confined in jail, shall be treated with unnecessary rigor.

### Excessive Bail and Punishment Prohibited.

SEC. 16. Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishment shall  
36 not be inflicted. All penalties shall be proportioned to the nature of the offense.

### Offenses Bailable.

SEC. 17. Offenses, other than murder and treason, shall be bailable by sufficient sureties. Murder and treason shall not be bailable when the proof is evident or the presumption strong.

### Reformation the Basis of Penal Code.

SEC. 18. The penal code shall be founded on the principles of reformation, and not of vindictive justice.

### Jury to Determine Law and Facts.

SEC. 19. In all criminal cases whatever, the jury shall have the right to determine the law and the facts.



### Trial by Jury in Civil Cases.

SEC. 20. In all civil cases, the right of trial by jury shall remain inviolate.

### Compensation for Services.

SEC. 21. No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, in case of the State, without just compensation first assessed and tendered, save only in case of necessity.

### Exemption—No Imprisonment for Debt.

SEC. 22. The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall  
37 be no imprisonment for debt except in case of fraud.

### Privileges Equal.

SEC. 23. The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

### No Ex Post Facto Laws.

SEC. 24. No ex post facto law, or laws impairing the obligation of contract, shall be passed.

### Taking Effect of Laws.

SEC. 25. No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution.

### Suspension of Laws.

SEC. 26. The operation of the laws shall never be suspended, except by authority of the general assembly.

### Suspension of Habeas Corpus.

SEC. 27. The privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion, and then only if the public safety demands it.

### Treason.

SEC. 28. Treason against the state shall consist only in levying war against it, and in giving aid and comfort to its enemies.

### Proof of Treason.

38 SEC. 29. No person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or upon his confession in open court.

## Effect of Conviction.

SEC. 30. No conviction shall work corruption of blood or forfeiture of estate.

## Right to Assemble, Instruct, and Petition.

SEC. 31. No law shall restrain any of the inhabitants of the state from assembling together, in a peaceable manner, to consult for their common good, nor from instructing their representatives; nor from applying to the general assembly for redress of grievances.

## Right to Bear Arms.

SEC. 32. The people shall have the right to bear arms for the defense of themselves and the state.

## Militia Subject to Civil Power.

SEC. 33. The military shall be kept in strict subordination to the civil power.

## Restrictions upon Soldiers.

SEC. 34. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner to be prescribed by law.

## No Titles of Nobility.

SEC. 35. The general assembly shall not grant any title of nobility nor confer hereditary distinctions.

## Emigration Free.

SEC. 36. Emigration from the state shall not be prohibited.

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## Slavery Prohibited.

SEC. 37. There shall be neither slavery nor involuntary servitude within the state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. No indenture of any negro or mulatto, made and executed out of the bounds of the State, shall be valid within the state.

## ARTICLE II.

## Suffrage and Elections—Elections Free.

SECTION 1. All elections shall be free and equal.

## Qualifications of Electors.

SEC. 2. In all elections not otherwise provided for by this constitution, every male citizen of the United States, of the age of twenty-one years and upward, who shall have resided in the State during the twelve months, and in the township sixty days, and in

the precinct thirty days, immediately preceding such election, shall be entitled to vote in the precinct in which he may reside if he shall have been duly registered according to law enacted by the general assembly as in this section provided and shall have paid his poll tax due and payable the year of such election and the year previous thereto without delinquency, but all poll tax shall be payable in full at the spring payment of taxes, and may be paid separately from other taxes at the option of the taxpayer. It shall be the duty of the general assembly to provide by law at its first session after the adoption of this constitution, for the registration of 40 all legal voters up to, and including November 1, 1913; but thereafter, no person not theretofore registered, shall be admitted to registration who cannot read in English or some other known tongue any section of the constitution of the state.

#### Soldiers—Seamen—Marines.

SEC. 3. No soldier, seaman, or marine, in the army or navy of the United States, or of their allies, shall be deemed to have acquired a residence in the state, in consequence of having been stationed within the same; nor shall any soldier, seaman or marine have the right to vote.

#### Residence.

SEC. 4. No person shall be deemed to have lost his residence in this State by reason of his absence from the state, either on business of this state or of the United States; but any person absent from the state for twelve consecutive months for other reasons shall lose his residence unless, prior to the expiration of such year, he files with the clerk of the circuit court of the county in which he resides, a declaration of his intent to hold his residence, and the exact location of the same.

#### Bribery Disqualifies for Office.

SEC. 5. Every person shall be disqualified for holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat or reward to secure his election.

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#### Challenge to Duel.

SEC. 6. Every person who shall give or accept a challenge to fight a duel, or who shall knowingly carry to another person such challenge, or who shall agree to go out of the state to fight a duel, shall be ineligible to any office of trust or profit.

#### Disfranchisement.

SEC. 7. The general assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime.

### Effect of Holding Lucrative Office.

SEC. 8. No person holding a lucrative office or appointment, under the United States, or under this state, shall be eligible to a seat in the general assembly; nor shall any person hold more than one lucrative office at the same time, except as by this constitution expressly permitted: Provided, that officers in the militia to which there is attached no annual salary, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative; and, Provided, also, That counties containing less than one thousand polls may confer the office of clerk, recorder and auditor, or any two of said offices, upon the same person.

### Defaulters Not Eligible.

SEC. 9. No person who may hereafter be a collector or holder of public moneys shall be eligible to any office of trust or profit until he shall have accounted for and paid over, according to law, all sums for which he may be liable.

### Pro Tempore Appointments.

SEC. 10. In all cases in which it is provided that an office shall not be filled by the same person more than a certain number of years continuously, an appointment pro tempore shall not be reckoned a part of that term.

### Electors Free from Arrest.

SEC. 11. In all cases, except treason, felony, and breach of the peace, electors shall be free from arrest in going to elections, during their attendance there, and in returning from the same.

### Method of Election.

SEC. 12. All elections by the people shall be by ballot; and all elections by the general assembly, or either branch thereof, shall be viva voce.

### Time of Elections.

SEC. 13. All general elections shall be held on the first Tuesday after the first Monday in November; but township elections may be held at such time as may be provided by law: Provided, That the general assembly may provide by law for the election of all judges of courts of general and appellate jurisdiction by an election to be held for such officers only, at which time no other officer shall be voted for; and shall also provide for the registration of all persons entitled to vote.

## ARTICLE III.

## Distribution of Powers.

SECTION 1. The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided.

## ARTICLE IV.

## Legislative—General Assembly.

SECTION 1. The legislative authority of the state shall be vested in the general assembly which shall consist of a senate and a house of representatives. The style of every law shall be: Be it enacted by the general assembly of the State of Indiana;" and no law shall be enacted, except by bill.

## Number of Members.

SEC. 2. The senate shall not exceed fifty members; the house of representatives shall not exceed one hundred and thirty members, the same to be apportioned among the several counties of the state as in section 4 of this article provided; and they shall be chosen by the electors of the respective counties and the districts into which the state may from time to time be divided.

## Term of Office of Senators.

SEC. 3. Senators shall be elected for the term of four years  
44 from the day next after the general election; Provided, however, That the senators holding office at the time this constitution goes into effect, shall serve until the expiration of the term for which they were elected.

## Term of Office of Representatives—Apportionment.

SEC. 4. Each county shall have at least one representative in the house of representatives, who shall be elected for a term of two years from the day after their election. A representative quota shall be obtained by dividing the total population of the state at the last national census by ninety-two, and each county having population in excess of a quota, shall have an additional representative for each full quota and fractional surplus of half a quota, in excess of the first quota. If any office of representative shall become vacant by death, resignation or otherwise, the governor shall call a special election to fill the vacancy.

## Apportionment of Senators.

SEC. 5. The number of senators shall be apportioned among the several counties according to the population as shown by the last

preceding United States census, but they shall only be apportioned every ten years; Provided, That the first election of senators in the general assembly under this constitution, shall be according to the apportionment last made by the general assembly before the adoption of this constitution.

45

#### Senatorial District.

SEC. 6. A senatorial district where more than one county shall constitute a district, shall be composed of contiguous counties, and no county for senatorial apportionment, shall ever be divided.

#### Qualifications.

SEC. 7. No person shall be a senator or representative, who, at the time of his election is not a citizen of the United States; nor any one who has not been, for two years next preceding his election, an inhabitant of this state, and for one year next preceding his election, an inhabitant of the county or district whence he may be chosen. Senators shall be at least twenty-five and representatives at least twenty-one years of age.

#### Privilege from Arrest.

SEC. 8. Senators and representatives in all cases except treason, felony, and breach of the peace, shall be privileged from arrest during the session of the general assembly and in going to and returning from the same; and shall not be subject to any civil process during the session of the general assembly, nor during the fifteen days next before the commencement thereof. For any speech or debate in either house, a member shall not be questioned in any other place.

#### Regular and Special Sessions.

46 SEC. 9. The sessions of the general assembly shall be held biennially at the capital of the state beginning on the first Thursday after the first Monday in January, 1913, and on the same day every second year thereafter unless a different day or place shall have been appointed by law. The general assembly shall remain in session for not exceeding one hundred days. If, in the opinion of the governor, the public welfare shall require it, he may, at any time, by proclamation, call a special session for a specific purpose or purposes, but for a limited time, not to exceed thirty days, at which special session, only such specified purpose or purposes shall be taken up and acted upon.

#### Officers—Adjournment.

SEC. 10. Each house, when assembled, shall choose its own officers (the president of the senate excepted), judge the elections, qualifications, and returns of its own members, determine its rules of proceeding, and sit upon its own adjournment. But neither house shall, without the consent of the other, adjourn for more than three days nor to any place other than that in which it may be sitting.

### Quorum.

SECTION 11. Two-thirds of each house shall constitute a quorum to do business; but a smaller number may meet, adjourn, from day to day, and compel the attendance of absent members. A quorum being in attendance, if either house fails to effect an organization within the first five days thereafter the members of the house  
47 so failing shall be entitled to no compensation, from the end of the said five days, until an organization shall have been effected.

### Journal.

SEC. —. Each house shall keep a journal of its proceedings, and publish the same. The yeas and Nays, on any question, shall, at the request of any two members, be entered, together with the names of the members demanding the same, on the journal: Provided, That on a motion to adjourn, it shall require one-tenth of the members present to order the yeas and nays.

### Doors to Be Open.

SEC. 13. The doors of each house and of committees of the whole shall be kept open, except in such cases as, in the opinion of either house, may require secrecy.

### Disorderly Behavior Punishable.

SEC. 14. Either house may punish its members for disorderly behavior, and may, with the concurrence of two-thirds, expel a member; but not a second time for the same cause.

### Imprisonment for Contempt.

SEC. 15. Either house, during its session, may punish by imprisonment, any person not a member who shall have been guilty of disrespect to the house, by disorderly or contemptuous behavior, in its presence; but such imprisonment shall not, at any time, exceed twenty-four hours.  
48

### Powers of Each House.

SEC. 16. Each house shall have all powers necessary for a branch of the legislative department of a free and independent state.

### Bills—Origin.

SEC. 17.—Bills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives.

### Reading and Vote.

SEC. 18. Every bill shall be read, by sections, on three several days, in each house; unless, in case of emergency, two-thirds of the

house where such bill may be depending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of a bill by sections, on its final passage, shall, in no case, be dispensed with; and the vote on the passage of every bill or joint resolution shall be taken by yeas and nays.

### Subject Matter and Title.

SEC. 19. Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title unless such act shall provide a brief and comprehensive name for itself, by which it may thereafter be known and referred to; but if any subject shall be embraced in an act which shall  
49 not be expressed in or fairly covered by the title, such an act shall be void only as to so much thereof as shall not be expressed or covered.

### Plain Wording.

SEC. 20. Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms.

### Acts—How Amended.

SEC. 21. No act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length.

### Local Laws Forbidden.

SEC. 22. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

Regulating the jurisdiction and duties of justices of the peace and of constables;

For the punishment of crimes and misdemeanors;

Regulating the practice in courts of justice;

Providing for changing the venue in civil and criminal cases;

Granting divorces;

Changing the names of persons;

For laying out, opening and working on, highways, and for the election or appointment of supervisors;

Vacating roads, town plats, streets, alleys and public squares;

50 Summoning and impaneling grand and petit jurors and providing for their compensation;

Regulating county and township business;

Regulating the election of county and township officers, and their compensations;

For the assessment and collection of taxes for state, county, township, or road purposes;

Providing for supporting common schools, and for the preservation of schools funds;

In relation to fees or salaries except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required;



In relation to interest on money:

Providing for opening and conducting the election of state, county, or township officers, and designating the place of voting;

Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees;

But the general assembly may adopt special charters for the different cities of the state.

### Laws Must Be General.

51 SEC. 23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state.

### Suits Against the State.

SEC. 24. Provision may be made by general law, for bringing suit against the state, as to all liabilities originating after the adoption of this constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the state, shall ever be passed.

### Passage of Bills.

SEC. 25. A majority of all the members elected to each house shall be necessary to pass every joint bill or resolution; and all bills and joint resolutions so passed shall be signed by the presiding officers of the respective houses.

### Protest and Entry.

SEC. 26. Any member of either house shall have the right to protest, and to have his protest, with his reasons for dissent, entered on the journal.

### Public Laws.

SEC. 27. Every statute shall be a public law, unless otherwise declared in the statute itself.

### Publication—Emergency.

52 SEC. 28. No act shall take effect until the same shall have been published and circulated in the several counties of this state by authority, except in case of an emergency; which emergency shall be declared in the preamble or in the body of the law.

### Pay of Members.

SEC. 29. The members of the general assembly shall receive for their services a compensation to be fixed by law, but no increase of compensation shall take effect during the session at which such increase shall be made.

### Members Ineligible to Certain Offices.

SEC. 30. No senator or representative shall, during the term for which he may have been elected, be eligible to any office, the election of which is vested in the general assembly; nor shall he be appointed to any civil office of profit, which shall have been created, or the emoluments of which shall have been increased, during such term, but this latter provision shall not be construed to apply to any office elective by the people.

## ARTICLE V.

### Executive—Governor.

SECTION 1. The executive powers of the state shall be vested in a governor. He shall hold his office during four years, and shall not be eligible more than four years in any period of eight years.

### Lieutenant-Governor.

SEC. 2. There shall be a lieutenant-governor, who shall hold his office during four years.

### Election.

53 SEC. 3. The governor and lieutenant-governor shall be elected at the times and places of choosing members of the general assembly.

### Manner of Voting.

SEC. 4. In voting for governor and lieutenant-governor, the electors shall designate for whom they vote as governor and for whom as lieutenant-governor. The returns of every election for governor and lieutenant-governor shall be sealed up and transmitted to the seat of government, directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the general assembly.

### Plurality Elects.

SEC. 5. The persons, respectively, having the highest number of votes for governor and lieutenant-governor shall be elected; but in case two or more persons shall have an equal, and the highest, number of votes for either office, the general assembly shall, by joint vote, forthwith proceed to elect one of the said persons governor or lieutenant-governor, as the case may be.

### Contests.

SEC. 6. Contested elections for governor or lieutenant-governor shall be determined by the general assembly, in such manner as may be prescribed by law.

### Qu-ifications.

54 SEC. 7. No person shall be eligible to the office of governor or lieutenant-governor who shall not have been five years a citizen of the United States, and also a resident of the State of Indiana during the five years next preceding his election; nor shall any person be eligible to either of the said offices who shall not have attained the age of thirty years.

### Persons Ineligible.

SEC. 8. No member of congress, or person holding any office under the United States or under this state, shall fill the office of governor or lieutenant-governor.

### Term of Office.

SEC. 9. The official term of the governor and lieutenant-governor shall commence on the second Monday of January, in the year one thousand nine hundred and thirteen: and on the same day every fourth year thereafter.

### Vacancies.

SEC. 10. In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the lieutenant-governor; and the general assembly shall, by law, provide for the case of removal from office, death, resignation, or inability, both of the governor and lieutenant-governor, declaring what officer shall then act as governor; and such officer shall act accordingly, until the disability be removed, or a governor be elected.

55 President pro Tempore of Senate.

SEC. 11. Whenever the lieutenant-governor shall act as governor, or shall be unable to attend as president of the senate, the senate shall elect one of its own members as president for the occasion.

### Governor—Commander in Chief.

SEC. 12. The governor shall be commander-in-chief of the military and naval forces, and may call out such forces to execute the laws, or to suppress insurrection, or to repel invasion.

### Messages.

SEC. 13. He shall, from time to time, give to the general assembly information touching the condition of the state, and recommend such measures as he shall judge to be expedient.

### Bills Signed—Power to Veto.

SEC. 14. Every bill which shall have passed the general assembly shall be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it

shall have originated, which house shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, three-fifths of all the members elected to that house shall agree to pass the bill, it shall be sent, with the governor's objections, to the other house, by which it shall likewise be reconsidered; and, if approved by three-fifths of all the members elected to that house, it shall be a law. If any bill shall not be returned by the governor within three days, Sundays excepted, after it shall have been presented to him, it shall be a law without his signature, unless the general adjournment shall prevent its return, in which case it shall be a law, unless the governor, within five days next after adjournment, shall file such bill, with his objections thereto, in the office of secretary of state, who shall lay the same before the general assembly, at its next session, in like manner as if it had been returned by the governor. But no bill shall be presented to the governor without his consent within three days next previous to the final adjournment of the general assembly. The governor may veto any clause or clauses, item or items, in any appropriation bill, and may approve the residue of such bill.

#### Information from Officers.

SEC. 15. The governor shall transact all necessary business with the officers of government, and may require information, in writing, from the officers of the administrative department, upon any subject relating to the duties of their respective offices.

#### Execution of Laws.

SEC. 16. He shall take care that the laws be faithfully executed.

#### Pardons and Reprieves.

57 SEC. 17. He shall have the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting; when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and also the name of all persons in whose favor remissions of fines and forfeitures shall have been made and the several amounts remitted: Provided, however, That the general assembly may, by law, constitute a council, to be composed of officers of state, without whose advice and consent the governor shall not have power to grant pardons, in any case, except such as may, by law, be left to his sole power.

## Governor May Fill Vacancies.

SEC. 18. When during a recess of the general assembly, a vacancy shall happen in any office, the appointment to which is vested in the general assembly; or when, at any time, a vacancy shall have occurred in any other state office, or in the office of judge of any court; the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.

## Writs of Election to Assembly.

SEC. 19. He shall issue writs of election to fill such vacancies as may have occurred in the general assembly.

## Seat of Government—When May Change.

SEC. 20. Should the seat of government become dangerous from disease or a common enemy, he may convene the general assembly at any other place.

## Duties of Lieutenant-Governor.

SEC. 21. The Lieutenant-governor shall, by virtue of his office, be president of the senate; have a right, when in committee of the whole, to join in debate, and to vote on all subjects; and, whenever the senate shall be equally divided, he shall give the casting vote.

## Pay of Governor.

SEC. 22. The governor shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the term for which he shall have been elected.

## Pay of Lieutenant-Governor.

SEC. 23. The Lieutenant-governor, while he shall act as president of the senate, shall receive for his services the same compensation as the speaker of the house of representatives; and any person acting as governor shall receive the compensation attached to the office of governor.

## Ineligible to Other Office.

SEC. 24. Neither the governor nor lieutenant-governor shall be eligible to any other office during the term for which he shall have been elected.

## ARTICLE VI.

## Administrative—State Officers—Terms.

SEC. 1. There shall be elected by the voters of the state, a secretary, an auditor, a treasurer of state, an attorney-general, reporter of the supreme court and clerk of the supreme court. Said officers and

all other state officers created by law and to be elected by the people, except supreme court judges, shall, severally, hold their offices for four years. They shall perform such duties as may be enjoined by law; and no person other than judges shall be eligible to any of said offices for more than four years in any period of eight years.

#### Terms of County Offices.

SEC. 2. There shall be elected in each county, by the voters thereof, at the time of holding general elections, a clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner and surveyor, who shall severally hold their offices for four years; and no person shall be eligible to either of said offices for more than four years in any period of eight years.

#### County and Township Officers.

60 SEC. 3. Such other county and township officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law.

#### Qualifications of County Officers.

SEC. 4. No person shall be elected or appointed as a county officer who shall not be an elector of the county; nor any one who shall have been an inhabitant thereof during one year next preceding his appointment, if the county shall have been so long organized; but if the county shall not have been so long organized, then within the limits of the county or counties out of which the same shall have been taken.

#### Residence of State Officers.

SEC. 5. The governor and the secretary, auditor, and treasurer of state shall, severally, reside and keep the public records, books and papers in any manner relating to the respective offices at the seat of government.

#### Residence of Other Officers.

SEC. 6. All county, township and town officers shall reside within their respective counties, townships and towns; and shall keep their respective offices at such places therein and perform such duties as may be directed by law.

#### Impeachment of State Officers.

SEC. 7. All state officers shall, for crime, incapacity, or negligence be liable to be removed from office, either by impeachment  
61 by the house of representatives, to be tried by the senate, or by a joint resolution of the general assembly; two-thirds of the members elected to each branch voting, in either case, therefor.

### Impeachment of County Officers.

SEC. 8. All state, county, township and town officers may be impeached, or removed from office, in such manner as may be prescribed by law.

### Vacancies.

SEC. 9. Vacancies in county, township and town offices shall be filled in such manner as may be prescribed by law.

### County Boards.

SEC. 10. The general assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character.

## ARTICLE VII.

### Judicial—Powers.

SECTION 1. The judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish.

### Number of Judges—Term.

SEC. 2. The supreme court shall consist of not less than five, nor more than eleven judges; a majority of whom shall form a quorum. They shall hold their offices for six years, if they so long behave well.

### Judicial Districts.

SEC. 3. The state shall be divided into as many districts  
62 as there are judges of the supreme court; and such districts shall be formed of contiguous territory, as nearly equal in population as, without dividing a county, the same can be made. One of said judges shall be elected from each district, and reside therein; but said judges shall be elected by the electors of the state at large.

### Jurisdiction.

SEC. 4. The supreme court shall have jurisdiction co-extensive with the limits of the state in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the general assembly may confer.

### Decisions in Writing.

SEC. 5. The supreme court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case and the decision of the court thereon.

### Publication of Decisions.

SEC. 6. The general assembly shall provide, by law, for the speedy publication of the decisions of the supreme court made under this constitution; but no judge shall be allowed to report such decisions.

### Clerk of Supreme Court.

SEC. 7. There shall be elected, by the voters of the state, a clerk of the supreme court, who shall hold his office four years, and whose duties shall be prescribe- by law.

### Circuit Courts.

SEC. 8. The circuit courts shall each consist of one judge, and shall have such civil and criminal jurisdiction as may be prescribed by law.

### Judicial Circuits—Terms.

SEC. 9. The state shall, from time to time, be divided into judicial circuits; and a judge for each circuit shall be elected by the voters thereof. He shall reside within the circuit, and shall hold his office for the term of six years, if he so long behave well.

### Special Judges.

SEC. 10. The general assembly may provide, by law, that the judge of one circuit may hold the courts of another circuit in cases of necessity or convenience; and in case of temporary inability of any judge, from sickness or any other cause, to hold the courts in his circuit, provision may be made by law for holding such courts.

### Prosecuting Attorneys—Term.

SEC. 11. There shall be elected in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for four years, and shall not be eligible to hold said office more than four years in any period of eight years.

### Removal of Judge or Prosecutor.

SEC. 12. Any judge or prosecuting attorney who shall have been convicted of corruption or other high crime, may, on information in the name of the state, be removed from office by the supreme court, or in such other manner as may be prescribed by law.

### Pay of Judges.

SEC. 13. The judges of the supreme court and circuit courts shall, at stated times, receive a compensation which shall not be diminished during their continuance in office.



### Justices of the Peace.

SEC. 14. A competent number of justices of the peace shall be elected by the voters in each township in the several counties. They shall continue in office four years, and their powers and duties shall be prescribed by law.

### Conservators of the Peace.

SEC. 15. All judicial officers shall be conservators of the peace in their respective jurisdiction.

### Ineligibility of Judges.

SEC. 16. No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office.

### Grand Jury System.

SEC. 17. The general assembly may modify or abolish the grand jury system.

65

### Criminal Prosecutions.

SEC. 18. All criminal prosecutions shall be carried on in the name and by the authority of the state; and the style of all process shall be, "The State of Indiana."

### Courts of Conciliation.

SEC. 19. Tribunals of conciliation may be established with such powers and duties as shall be prescribed by law; or the powers and duties of the same may be conferred upon other courts of justice, but such tribunals or other courts, when sitting as such, shall have no power to render judgment to be obligatory on the parties, unless they voluntarily submit their matters of difference and agree to abide the judgment of such tribunal or court.

### Revision of Laws—Initiative, Referendum and Recall.

SEC. 20. The general assembly shall, from time to time, take such steps as may be necessary for the codification of the laws of the state, and on petition of twenty-five per centum of the qualified electors of the state at the last general election, the general assembly may adopt laws providing for the initiative, referendum and recall, both of state and local application. But no bill for the recall of the judiciary shall ever be passed.

### Admission to Bar.

SEC. 21. The general assembly may by law provide for the qualifications of persons admitted to the practice of the law.

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## ARTICLE VIII.

## Education—Common Schools.

SECTION 1. Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government, it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all.

## Common School Fund.

SEC. 2. The common school fund consist of the congressional township fund, and the lands belonging thereto;

The surplus revenue fund;

The saline fund, and the lands belonging thereto;

The bank tax fund, and the fund arising from the one hundred and fourteenth section of the charter of the state bank of Indiana;

The fund to be derived from the sale of county seminaries, and the moneys and property heretofore held for such seminaries; from the fines assessed for breaches of the penal laws of the state; and from all forfeitures which may accrue;

67 All lands and other estate which shall escheat to the state, for want of heirs or kindred entitled to the inheritance;

All lands that have been, or may hereafter be granted to the state, where no special purpose is expressed in the grant, and the proceeds of the sale thereof; including the proceeds of the sales of the swamp lands granted to the State of Indiana by the act of congress of the 28th of September, 1850, and deducting the expense of selecting and draining the same;

Taxes on property of corporations, that may be assessed by the general assembly for common school purposes.

## Principal, a Perpetual Fund.

SEC. 3. The principal of the common school fund shall remain a perpetual fund which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of common schools and to no other purpose whatever.

## Investment and Distribution.

SEC. 4. The general assembly shall invest in some safe and profitable manner all such portions of the common school fund as have not heretofore been intrusted to the several counties; and shall make provision, by law, for the distribution, among the several counties, of the interest thereof.

## Reinvestment.

68 SEC. 5. If any county shall fail to demand its proportion of such interest for common school purposes, the same shall be reinvested for the benefit of such county.

### Counties—Liability.

SEC. 6. The several counties shall be held liable for the preservation of so much of the said fund as may be entrusted to them, and for the payment of the annual interest thereof.

### Trust Funds Inviolable.

SEC. 7. All trust funds held by the state shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created.

### Superintendent of Public Instruction.

SEC. 8. The general assembly shall provide for the election, by the voters of the state, of a state superintendent of public instruction, who shall hold his office for four years, and whose duties and compensation shall be prescribed by law.

## ARTICLE IX.

### State Institutions—Benevolent.

SECTION 1. It shall be the duty of the general assembly to provide by law, for the support of institutions for the education of the deaf and dumb, and of the blind, and, also, for the treatment of the insane.

### Houses of Refuge.

SEC. 2. The general assembly shall provide houses of refuge for the correction and reformation of juvenile offenders.

69

### County Asylums.

SEC. 3. The county boards shall have power to provide farms as an asylum for those persons who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society.

## ARTICLE X.

### Finance—Assessment and Taxation.

SECTION 1. The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting, such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law.

### Uses of Revenue—Payment of Public Debt.

SEC. 2. All the revenues derived from the sale of any of the public works belonging to the state, and from the net annual income thereof, and any surplus that may, at any time, remain in

the treasury, derived from taxation for general state purposes, after the payment of the ordinary expenses of the government, and of the interest on bonds of the state, other than bank bonds, shall be annually applied, under the direction of the general assembly, to the payment of the principal of the public debt.

70

### Appropriations.

SEC. 3. No money shall be drawn from the treasury but in pursuance of appropriations made by law.

### Receipts and Expenditures—Statement.

SEC. 4. An accurate statement of the receipts and expenditures of the public money shall be published with the laws of each regular session of the general assembly.

### Creation of Debt.

SEC. 5. No law shall authorize any debt to *be* contracted on behalf of the state, except in the following cases: To meet casual deficits in the revenue; to pay interest on the state debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense.

### Counties—Stock in Corporations.

SEC. 6. No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company; nor shall the general assembly ever, on behalf of the state, assume the debts of any county, city, town or township, nor of any corporation whatever.

### Wabash and Erie Canal.

71 No law or resolution shall ever be passed by the general assembly of the State of Indiana that shall recognize any liability of this state to pay or redeem any certificates of stocks issued in pursuance of an act entitled "An act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville," passed January 19, 1846; and an act supplemental to said act, passed January 29, 1847; which, by the provisions of said acts, or either of them, shall be payable exclusively from the proceeds of the canal lands, and the tolls and revenues of the canal, in said acts mentioned; and no such certificates of stock shall ever be paid by this state.

## ARTICLE XI.

### Corporations—Incorporation of Banks.

SECTION 1. The general assembly shall not have power to establish or incorporate any bank or banking company or moneyed insti-

tution, for the purpose of issuing bills of credit or bills payable to order or bearer, except under the conditions prescribed in this constitution.

#### General Banking Law.

SEC. 2. No bank shall be established otherwise than under a general banking law, except as provided in the fourth section of this article.

#### Registry of Notes.

SEC. 3. If the general assembly shall enact a general banking law, such law shall provide for the registry and countersigning,  
72 by an officer of the state, of all paper credit designed to be circulated as money; and ample collateral security, readily convertible into specie for the redemption of the same in gold or silver, shall be required; which collateral security shall be under the control of the proper officer or officers of state.

#### Bank with Branches.

SEC. 4. The general assembly may also charter a bank with branches without collateral security as required in the preceding section.

#### Branches Mutually Responsible.

SEC. 5. If the general assembly shall establish a bank with branches, the branches shall be mutually responsible for each other's liabilities upon all paper credit issued as money.

#### Liability of Stockholders.

SEC. 6. The stockholders in every bank or banking company shall be individually responsible, to an amount over and above their stock equal to their respective shares of stock, for all debts or liabilities of said bank or banking company.

#### Redemption.

SEC. 7. All bills or notes issued as money shall be, at all times, redeemable in gold or silver; and no law shall be passed, sanctioning directly or indirectly, the suspension, by any bank or banking company, of specie payments.

#### 73 Holders' Preference.

SEC. 8. Holders of bank notes shall be entitled in case of insolvency, to preference of payment over all other creditors.

#### Interest Rate.

SEC. 9. No bank shall receive, directly or indirectly a greater rate of interest than shall be allowed by law to individuals loaning money.

### Fifty Years' Limitation.

SEC. 10. Every bank, or banking company, shall be required to cease all banking operations within fifty years from the time of its organization, and promptly thereafter to close its business.

### Trust Funds.

SEC. 11. The general assembly is not prohibited from investing the trust funds in a bank with branches, but in case of such investment, the safety of the same shall be guaranteed by unquestionable security.

### State Not to be Stockholder.

SEC. 12. The state shall not be a stockholder in any bank, after the expiration of the present bank charter, nor shall the credit of the state ever be given, or loaned, in aid of any person, association, or corporation; nor shall the state hereafter become a stockholder in any corporation or association.

### General Corporation Laws.

74 SEC. 13. Corporations, other than banking, shall not be created by special act, but may be formed under general laws.

### Individual Liability.

SEC. 14. Dues from corporations, other than banking, shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law.

## ARTICLE XII.

### Militia—Organization.

SECTION 1. The militia shall consist of all able-bodied white male persons, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States, or of this state; and shall be organized, officered, armed, equipped and trained in such manner as may be provided by law.

### Governor's Aids.

SEC. 2. The governor shall appoint the adjutant, quarter-master and commissary generals.

### Commissions.

SEC. 3. All militia officers shall be commissioned by the governor, and shall hold their offices not longer than six years.

## Division of Militia.

SEC. 4. The general assembly shall determine the method of dividing the militia into divisions, brigades, regiments, battalions and companies, and fix the rank of all staff officers.

75

## Sedentary and Active.

SEC. 5. The militia may be divided into classes of sedentary and active militia in such manner as shall be prescribed by law.

## Exemption from Service.

SEC. 6. No person conscientiously opposed to bearing arms shall be compelled to do militia duty; but such person shall pay an equivalent for exemption, the amount to be prescribed by law.

## ARTICLE XIII.

## Political and Municipal Corporations.

SECTION 1. No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to any amount, in the aggregate exceeding two per centum on the value of taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void: Provided, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authorities in their discretion, may incur obligations necessary for the public protection and defense, to such an amount as may be requested in such petition.

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## ARTICLE XIV.

## Boundaries.

SECTION 1. In order that the boundaries of the state may be known and established, it is hereby ordained and declared that the State of Indiana is bounded on the east by the meridian line which forms the western boundary of the State of Ohio; on the south, by the Ohio river, from the mouth of the Great Miami river to the mouth of the Wabash river; on the west, by a line drawn along the middle of the Wabash river, from its mouth to a point where a due north line, drawn from the town of Vincennes, would last touch the northwestern shore of said Wabash river; and thence by a due north line, until the same shall intersect an east and west line drawn through a point ten miles north of the southern extreme of Lake Michigan; on the north, by said east and west line, until the same shall intersect the first-mentioned meridian line which forms the western boundary of the State of Ohio.

### Jurisdictions.

SEC. 2. The State of Indiana shall possess jurisdiction and sovereignty coextensive with the boundaries declared in the preceding section; and shall have concurrent jurisdiction, in civil and criminal cases, with the State of Kentucky, on the Ohio river, and with the State of Illinois, on the Wabash river, so far as said rivers form the common boundary between this state and said states respectively.

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### ARTICLE XV.

#### Miscellaneous—Official Appointments.

SECTION 1. All state officers whose appointments are not otherwise provided for in this constitution, shall be elected by the people or appointed by the governor as may be provided by law; and all municipal and local officers shall be elected or appointed as provided by law; but no officers shall be elected or appointed by the general assembly except its own officers and United States Senators; and no elective officer shall have his salary, compensation, or emoluments increased during the period for which he is elected.

#### Duration of Office.

SEC. 2. When the duration of any office is not provided for by this constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the general assembly shall not create any office the tenure of which shall be longer than four years.

#### Holding Over.

SEC. 3. Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified.

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#### Official Oath.

SEC. 4. Every person elected or appointed to any office under this constitution shall, before entering on the duties thereof, take an oath or affirmation to support the constitution of this state and of the United States, and also an oath of office.

#### State Seal.

SEC. 5. There shall be a seal of state, kept by the governor for official purposes, which shall be called the seal of the State of Indiana.

#### Commissions.

SEC. 6. All commissions shall issue in the name of the state, shall be signed by the governor, sealed by the state seal and attested by the secretary of state.



## Area of County.

SEC. 7. No county shall be reduced to an area less than four hundred square miles; nor shall any county under that area be further reduced.

## Lotteries Prohibited.

SEC. 8. No lottery shall be authorized, nor shall the sale of lottery tickets be allowed.

## Public Grounds.

SEC. 9. The following grounds owned by the state, in Indianapolis, namely, the state house square, the governor's circle, and so much of out-lot numbered one hundred and forty seven as lies north of the arm of the central canal, shall not be sold or leased.

## 79 Tippecanoe Battle Ground.

SEC. 10. It shall be the duty of the general assembly to provide for the permanent enclosure and preservation of the Tippecanoe battle ground.

## ARTICLE XVI.

## Amendments—How Made.

SECTION 1. Any amendment or amendments to this constitution may be proposed in either branch of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals; and it shall be the duty of the general assembly to submit such amendment or amendments to the electors of the state at the next general election and if a majority of said electors voting on such amendment or amendments shall ratify the same, such amendment or amendments shall become a part of the constitution; but — a majority of said electors shall not ratify the same, such amendment or amendments shall be defeated. Any political party may declare for or against any amendment, in convention, and have such declaration made a part of its ticket for submission to the electors, but no new constitution shall be submitted to the people of this state for ratification and adoption or rejection, until by virtue of an act of the general assembly, a majority of the legal voters of the state have declared in favor of a constitutional convention; when and whereupon such constitutional convention shall be convened in such manner as the general assembly may provide, but any constitution by such convention proposed shall be submitted to the voters of this state for ratification or rejection at a special election as may be ordered by the general assembly.

80

## Separate Vote.

SEC. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately; and while such amendment or amendments which shall have been agreed upon

be awaiting the action of the electors, no additional amendment or amendments on the same subject shall be proposed.

### Schedule.

This constitution, if adopted, shall take effect on the first day of January, in the year one thousand nine hundred and thirteen, and shall supersede the constitution adopted in the year one thousand eight hundred and fifty-one. That no inconvenience may arise from the change in the government, it is hereby ordained as follows:—

First. All laws now in force and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.

Second. All indictments, prosecutions, suits, pleas, complaints, and other proceedings pending in any of the Courts, shall be  
81 prosecuted to final judgment and execution; and all appeals, writs of error, certiorari and injunctions, shall be carried on in the several courts, in the same manner as is now provided by law.

Third. All fines, penalties and forfeitures, due or accruing to the state, or to any county therein, shall inure to the state, or to such county, in the manner prescribed by law. All bonds executed to the state, or to any officer in his official capacity, shall remain in force, and inure to the use of those concerned.

Fourth. All acts of incorporations for municipal purposes shall continue in force under this constitution until such time as the general assembly shall, in its discretion, modify or repeal the same.

Fifth. The governor, at the expiration of the present official term, shall continue to act until his successor shall have been sworn into office.

Sixth. There shall be a session of the general assembly, commencing on the first Thursday after the first Monday in January, in the year one thousand nine hundred and thirteen.

Seventh. Senators now in office and holding over, under the existing constitution, and such as may be elected at the next general election, and the representatives then elected, shall continue in office until the next general election under this constitution.

Eighth. The first general election under this constitution  
82 shall be held in the year one thousand nine hundred and fourteen.

Ninth. The first election for governor, lieutenant-governor, judges of the supreme and circuit courts, under this constitution, shall be held at the general election in the year one thousand nine hundred and sixteen, and all other officers at the general election in the year one thousand nine hundred and fourteen; but all officers who may be in office when this constitution shall go into effect shall hold their offices to the expiration of the term for which they shall have been elected, or until their successor shall have been elected and qualified.

Tenth. Every person elected by popular vote, and in any office which is continued by this constitution; and every person who shall be so elected to any such office before the taking effect of this constitution (except as in this constitution otherwise provided), shall continue in office until the term for which such person has been, or may be, elected, shall expire; Provided, that no such person shall

continue in office, after the taking effect of this constitution, for a longer period than the term of such office in this constitution prescribed.

Eleventh. On the taking effect of this constitution, all officers thereby continued in office shall, before proceeding in the further discharge of their duties, take an oath, or affirmation, to support this constitution.

83 Twelfth. All vacancies that may occur in existing offices, prior to the first general election under this constitution, shall be filled in the manner now prescribed by law.

### Election—Ballots.

SEC. 2. Any political party may declare in favor of said proposed new constitution, in which event it shall be the duty of the state board of election commissioners to prepare the ballot as provided by law. The state board of election commissioners are invested with power and authority to so prepare the ballots as to enable a voter of a political party which neither adopts nor opposes this proposed constitution, to vote his straight party ticket and at the same time, vote for or against the new constitution.

### Election Officers—Duties.

SEC. 3. All election officers and other officials required by law to perform any duties with reference to general elections, shall perform like duties with reference to the submission of this question to the people.

### Returns—Canvass—Result.

SEC. 4. The returns shall be canvassed as in general elections by the governor and secretary of state, and should a majority of the votes cast be in favor of said proposed new constitution, then the governor shall issue his proclamation declaring the same to be

84 in force and effect from and after the day mentioned therein. If a majority of the votes cast should be against its adoption, then the governor shall issue his proclamation declaring that the same has been rejected by the people of this state.

### Informalities—Liberal Construed.

SEC. 5. All informalities in this act with reference to the manner of presentation of this constitution, shall be liberally construed by the state board of election commissioners so as to enable the voters to intelligently vote thereon."

3. By the official count of the returns of the thirteenth census of the United States for the year 1910, the population of the state of Indiana was 2,700,876, and that the population of each of the counties shown by said census of the United States for said year is as follows:

*Population of the State by Counties.*

Indiana.		1910.
County.		
The State		2,700,876
Adams		21,840
Allen		93,386
Bartholomew		24,813
Benton		12,688
Blackford		15,820
Boone		24,673
	Brown	7,975
85	Carroll	17,970
	Cass	36,368
Clark		30,260
Clay		32,535
Clinton		26,674
Crawford		12,057
Daviess		27,747
Dearborn		21,396
Decatur		18,793
De Kalb		25,054
Delaware		51,414
Debois		19,843
Elkhart		49,008
Fayette		14,415
Floyd		30,293
Fountain		20,439
Franklin		15,335
Fulton		16,879
Gibson		30,137
Grant		51,426
Greene		36,873
Hamilton		27,026
Hancock		19,030
Harrison		20,232
Hendricks		20,840
Henry		29,758
	Howard	33,177
86	Huntington	28,982
	Jackson	24,727
Jasper		13,044
Jay		24,961
Jefferson		20,483
Jennings		14,203
Johnson		20,394
Knox		39,182
Kosciusko		27,936
Lagrange		15,148
Lake		82,864
Laporte		45,797

Lawrence	30,625
Madison	65,224
Marion	263,661
Marshall	24,175
Martin	12,950
Miami	29,350
Monroe	23,423
Montgomery	29,296
Morgan	21,182
Newton	10,504
Noble	24,009
Ohio	4,329
Orange	17,192
Owen	14,053
Parke	22,214
87 Perry	18,078
Pike	19,684
Porter	20,540
Posey	21,676
Pulaski	13,312
Putnam	20,520
Randolph	29,013
Ripley	19,452
Rush	19,349
St. Joseph	84,312
Scott	8,323
Shelby	26,802
Spencer	20,676
Starke	10,567
Steuben	14,274
Sullivan	32,439
Switzerland	9,914
Tippecanoe	40,063
Tipton	17,459
Union	6,260
Vanderburg	77,438
Vermillion	18,865
Vigo	87,930
Wabash	26,926
Warren	10,899
Warrick	21,911
Washington	17,445
88 Wayne	43,757
Wells	22,418
White	17,602
Whitley	16,892

## 4.

*Total Vote 1910.*

That the total number of votes cast at the general election held in the State of Indiana for the year 1910, for the office of Secretary

of State of Indiana aggregate 627,133; that said votes were divided as follows: Lewis G. Ellingham, candidate for said office on the Democratic ticket 299,935 votes, Otis E. Gully, Candidate for said office on the Republican ticket 287,568 votes, George Hits, candidate for said office on the Prohibition ticket, 17,024, Sherman G. Jones, candidate for said office on the Socialist ticket, 19,632, Oliver P. Stoner, candidate for said office on the Socialist labor ticket, 2,974.

That at the next general election to be held on the first Tuesday after the first Monday in November, 1912, there will be four or more tickets upon the general state ballot to be prepared by the State Board of Election Commissioners.

## 5.

### *Constitutional Amendment Submitted in 1910—Vote Thereon.*

That at the general election held in the year 1910 there was submitted to the electors, and all legal voters of the state of Indiana a proposed amendment to the constitution of the State of Indiana for the adoption or rejection by the legal voters of said state; that the number of votes cast on the question of the adoption or rejection of said proposed constitution- amendment, at said election aggregated 78,851; that said vote was divided as follows: 60,357 in favor of the adoption of said proposed amendment and 18,494 against the adoption of said proposed amendment.

89  
90 6. That the defendant, Lew G. Ellingham, was duly elected Secretary of State for the State of Indiana at the general election 1910, for the term of two years; that he qualified and entered upon the discharge of his duties in said office on December the 1st 1910, and is now holding, and will hold said office until his successor is duly elected and qualified.

That said defendant Lewis G. Ellingham, as such Secretary of State has not certified to the several clerks of the circuit courts of the several counties in the state of Indiana, or to any of such clerks of such counties, the act known as Senate Bill 407, being chapter 118 of the Acts of the general Assembly of 1911, nor has he certified to such clerks, or any of them, anything pertaining to such acts; that said Ellingham intends to, and will comply with and carry out the requirements of each and every statute of Indiana relative to the holding and conduct of the general election in 1912, so far as such requirements relate to the Secretary of State, unless enjoined; and will certify said Act known as Chapter 118 of said act to the Clerk of the Circuit court of each county in the State not less than thirty days before said election, unless enjoined.

### State Board of Election Commissioners.

91 7. That the defendant, Thomas R. Marshall, was duly elected Governor of the State of Indiana at the general election in 1908, for the term of four years; that he duly qualified and entered upon the discharge of the duties of said office on January 11, 1909; that thirty days prior to the general election in 1910 said

Thomas R. Marshall, as such officer, duly appointed defendants, Muter M. Bachelder and Charles O. Roemler, as members of the State Board of Election Commissioners for said state. That said defendants, Muter M. Bachelder and Charles O. Roemler accepted said appointment and duly qualified, and, together with said defendant, Thomas R. Marshall, constituted said Board of Election Commissioners for the State of Indiana; and that said defendants, Muter M. Bachelder and Charles O. Roemler, are members of the State Board of Election Commissioners of the State of Indiana, and will hold their respective offices until their successors are duly selected and appointed and until they shall be duly qualified; that neither of said defendants, Thomas R. Marshall, Muter M. Bachelder, nor Charles O. Roemler, has as yet done any act concerning the submission of the act set out and found in finding numbered "2" to the electors of the state at the next general election to be held upon the first Tuesday after the first Monday in the month of November, 1912, nor are said defendants, or either of them, threatening to do any act or acts relative to the holding of said general election or in the preparation of the ballots to be used at said election, except such act or acts as are required by the statute to be done by them, as constituting the State Board of Election Commissioners of the State of Indiana; that each of said named defendants, as such election commissioners, and constituting such Board of Election Commissioners, will comply with and carry out the requirements of each and every statute of Indiana relative to the holding and conduct of said general election to be held in 1912, so far as such requirements relate to said State Board of Election Commissioners and the act and conduct as members of such State Board of Election Commissioners, and will do each and every act required to be done by them, according to law, to submit said act, heretofore set out and found in finding numbered "2" herein, to the electors of the State of Indiana and to all the legal voters of said state for their adoption or rejection at said election, unless enjoined from so doing; and that said defendant, Thomas R. Marshall, as a member of the State Board of Election Commissioners, and the State Board of Election Commissioners, unless enjoined from so doing, will, at the general election to be held in 1912, cause a brief statement of said act set out and found in finding numbered "2" herein, to be printed on the said ballot with the word "yes" and "no" under the same so that the electors may indicate their preference and vote for the adoption or rejection of the proposed constitution set forth in said act.

93        8. That said proposed constitution, as set forth in the act set out and found in finding numbered "2" herein, was not entered on the journals of either the house or the senate at said 67th regular session of said general assembly, but that said proposed constitution and said act was referred to in the journals of the house and the senate of said general assembly by title, only; that said general assembly nor neither house thereof referred to said act set out and found in finding numbered "2" herein, nor

said proposed constitution contained therein, to the general assembly to be chosen at the next general election.

*Independent Voters.*

9. That there is in the state of Indiana, and has been for many years past, a number of electors and legal voters commonly known as "Independents," who do not belong to, nor affiliate with any political party of the State, which independent voters aggregate in number from one to five per cent. of the electors and legal voters within said state.

*Total Valuation and Assessment in State.*

10. The total assessed valuation of the taxable property within the state of Indiana for the year 1910 was \$1,843,341,739.00. That the total number of polls upon which poll tax was assessed in the state of Indiana for the year 1910 aggregated 449,738. That the total assessed valuation of the taxable property within said state, and the total number of pools upon which poll tax is assessed in said state, are substantially the same for the year 1911.

*Expense of Submission.*

11. That the total expense of preparing the state ballot of every kind, the tally sheets and other expense so far as relates to a submission of said proposed constitution set out in Finding numbered "2" herein, to the electors of the state and the legal voters of the state, at the general election to be held in the year 1912, to be paid out of the treasury of the state, and the several counties wherein the several election precincts will be situated within the state of Indiana, will aggregate in all between \$1000.00 and \$2000.00. If the proposed constitution set out in finding numbered "2" herein is printed on the ballots to be voted at the election in 1912, in the form of separate, specific amendments to the constitution, with the words "yes" and "no" appended to each amendment, so that the electors may indicate their preference and vote for the adoption or rejection of each of said amendments separately, then the total expense of preparing the said ballots of every kind, the tally sheets and other expenses, so far as relates to the submission of said amendments to the electors of the state, and legal voters thereof, at the general election to be held in the year 1912, to be paid out of the treasury of the state and the several counties wherein the several election precincts are situated within the state of Indiana, will aggregate in all the sum of \$5000.00.

CHARLES REMSTER,

*Judge of the Marion Circuit Court.*



*Conclusions of Law on the Facts Aforesaid.*

## 1st Conclusion of Law.

First. The Court concludes as a matter of law upon the foregoing facts that the law of the case is with the plaintiff; and the Act approved March 4, 1911, being Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana, submitting the proposed new constitution set forth in Paragraph 2 of the facts above found, is invalid and void for lack of power vested in 67th General Assembly of the State of Indiana to propose and submit the same to the electors of the State in the manner in which it is proposed therein.

## 2nd Conclusion of Law.

Second. The Court concludes as a matter of law upon the facts set forth in the special findings that the Act, approved March 4, 1911, being Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana, submitting the proposed new constitution is invalid and void because not proposed in accordance with the provisions of the present constitution of the State of Indiana but in violation thereof; and because in the exercise of legislative power as given to the said General Assembly in and under the Constitution of the State of Indiana the said Assembly had no power to frame and submit to the electors of the State of Indiana the said proposed new constitution in the special findings set forth, and the said Act is unconstitutional, null and void.

## 3rd Conclusion of Law.

Third. The Court concludes as a matter of law that the said Act of the 67th General Assembly, containing the proposed new constitution as set forth in Paragraph 2 of the special findings of fact, is void, because violative of articles 2, 4, and 5, of the ordinance of Congress of July 14, 1787, and section 4 of the act of Congress, approved April 19, 1816, to enable the people of the Indiana territory to form a constitution and state government, and the ordinance of the people of the Territory of Indiana in convention met at Corydon and adopted June 29, 1816, securing to the people of Indiana proportionate representation of the people in the legislature.

## 4th Conclusion of Law.

Fourth. The Court concludes as a matter of law that the proposed new constitution set forth in the said Act of the 67th General Assembly, being Chapter 118, as set forth in Paragraph 2 of the findings herein, is void, being in violation of the Act of Virginia conveying to the United States the territory northwest of the River Ohio, passed December 20, 1783, and providing that states formed out of said territory shall be distinct republican states when admitted members of the Federal Union; and article 5 of the Ordinance of 1787, declaring that the states created in said territory

shall be republican in form; and violative of section 4 of the Act of Congress, approved April 16, 1816, to enable the people of the

98 Indiana territory to frame a constitution and state government, providing that the same when formed shall be republican and not repugnant to the said ordinance, which proposition from the Congress was accepted by the said ordinance of the people of Indiana in convention adopted at Corydon on June 29, 1816, accepting the proposition of the said Congress contained in said Act of April 19, 1816; and section 4 of article 4 of the Constitution of the United States, securing to every state in this Union a republican form of government.

#### 5th Conclusion of Law.

Fifth. The Court concludes, upon the said facts that the law is with the plaintiff; and that he is entitled to have an injunction against the defendant Lew G. Ellingham, secretary of state for the State of Indiana, enjoining him from certifying to the clerk of each or any county in the state not less than thirty days before the election to be held in November, 1912, or at any time, the said proposed constitution set forth in paragraph 2 of the special findings; or any other question touching the same. (Section 6909.)

#### 6th Conclusion of Law.

Sixth. The Court concludes as a matter of law upon the said facts that the State Board of Election Commissioners, named in said finding, to-wit: Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, their successor or successors in office, should be enjoined from causing a brief statement or any statement of or concerning the said proposed new constitution, set forth in Finding

99 2 above, to be printed on the state ballots or on any ballots to be provided, distributed, and used by the electors of the general election to be held in November, 1912; or at any election to be held in the State of Indiana; and that the plaintiff is entitled to have an injunction preventing the same being done in whole or in part.

#### 7th Conclusion of Law.

Seventh. The plaintiff is entitled to have and recover of the defendants his costs.

CHARLES REMSTER,

*Judge Marion Circuit Court.*

#### 100 *Defd'ts' Exception to Each Conclusion of Law.*

The defendants each separately and severally at the time except to each conclusion of law separately.

#### *Defd't Ellingham's Exception to Each Conclusion of Law.*

The defendants, Lew G. Ellingham, as Secretary of State of Indiana at the time excepts to each conclusion of law separately.

*D'f'd't Thos. R. Marshall, Governors' Exception to Each Conclusion of Law.*

The defendant, Thomas R. Marshall, as Governor of the State of Indiana, at the time excepts to each conclusion of law separately.

*D'f'd'ts Roemler and Batchelder's Exception to Each Conclusion of Law.*

The defendants, Charles O. Roemler and Muter M. Batchelder, at the time except to each conclusion of law separately.

101 *Duplicate of Page 100.*

The defendants each separately and severally at the time except to each conclusion of law separately.

The defendant Lew G. Ellingham, as Secretary of State of the State of Indiana, at the time excepts to each conclusion of law separately.

The defendant, Thomas R. Marshall, as Governor of the State of Indiana, at the time excepts to each conclusion of law separately.

The defendants, Charles O. Roemler and Muter M. Batchelder, at the time except to each conclusion of law separately.

And now the defendants file their separate and several motion in arrest of judgment in the words and figures following:

102 STATE OF INDIANA,  
*County of Marion, ss:*

In the Marion Circuit Court.

No. 20079.

JOHN T. DYE

vs.

LEW G. ELLINGHAM et al.

*Motion in Arrest of Judgment.*

The defendants, each separately and severally, move the Court that the judgment in the above entitled cause be arrested for each of the following reasons, to-wit:

First. For the reason that the Court has no jurisdiction over the subject matter of this action.

Second. (1.) For the reason that the Court has no power to enjoin or to enforce an injunction against the Governor of the State of Indiana.

(2.) For the reason that "the Courts are not given a prerogative

to guard the people against themselves in the matter of adopting the organic law."

Third. For the reason that the Court does not have the power, authority or right by injunction or otherwise to interfere with, control or impede the executive department in the discharge of its functions.

Fourth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be a usurpation of judicial power.

103 Fifth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be null and void.

Sixth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Art. 4, \*4 of the Constitution of the United States, which guarantees to every state of the United States a republican form of government.

Seventh. For the reason that the Court has no power, authority or right to decide political questions or to enjoin political action.

Eighth. For the reason that the Court has no power to enjoin legislative action.

Ninth. For the reason that a judgment in accordance with the conclusions of law stated would be — contravention of Art. 1, \*1 of the Constitution of Indiana, providing that:

"All power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace safety, and well-being. For the advancement of these ends, the people have, at all times an inalienable right to alter and reform their government."

Tenth. For a reason that a judgment herein in accordance with the conclusions of law stated would be in contravention of Art. 3, \*1 of the Constitution of Indiana, by which the government of said state is divided into three separate, co-ordinate and independent departments.

104 Eleventh. For the reason that the complaint herein wholly fails to state any cause of action.

Twelfth. For the reason that the facts stated in the special finding of facts heretofore made wholly fail to establish any cause of action against the defendants.

THOMAS M. HONAN, *Att'y Gen.*  
STUART, HAMMOND & SIMMS,  
STOTSENBURG & WEATHERS,  
ROBY & WATSON,

*Attorneys for Defendants.*

*Motion in Arrest of Judgment Overruled and Def'ts' Exceptions.*

Which motion is overruled by the court, to which ruling the several defendants severally excepts.

And now Thomas R. Marshall, as Governor of the State of

Indiana, tenders his written motion to the court in arrest of Judgment in words and figures following:

105 STATE OF INDIANA,  
County of Marion, ss:

In the Marion Circuit Court.

No. 20079.

JOHN T. DYE

VS.

LEW G. ELLINGHAM et al.

*Motion in Arrest of Judgment.*

The Governor's Motion in Arrest of Judgment.

Comes now Thomas R. Marshall, as Governor of the State of Indiana, and moves the Court that the judgment in the above entitled cause be arrested on the following grounds, to-wit:

First. For the reason that the Court has no jurisdiction over the subject matter of this action.

Second. (1.) For the reason that the Court has no power to enjoin or to enforce an injunction against the Governor of the State of Indiana.

(2.) For the reason that "the Courts are not given a prerogative to guard the people against themselves in the matter of adopting the organic law."

Third. For the reason that the Court does not have power, authority or right by injunction or otherwise to interfere with, control or impede the executive department in the discharge of its functions.

Fourth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be a usurpation of judicial power.

Fifth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contra-  
106 vention of Art. 4, \*20 of the Constitution of the United States which guarantees a republican form of government to every state of the United States.

Sixth. For the reason that the Court has no power, authority or right to decide political questions or to enjoin political action.

Seventh. For the reason that the Court has no power to enjoin legislative action.

Eighth. For the reason that a judgment in accordance with the conclusions of — would be in contravention of Art. 1, \*1 of the Constitution of Indiana, providing that

"all power is adherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement

of these ends, the people have, at all times, an indefeasible right to alter and reform their government."

Ninth. For the reason that a judgment herein in accordance with the conclusions of law stated would be in contravention of Art. 3, \*1 of the Constitution of Indiana, by which the government of said state is divided into three separate, co-ordinate and independent departments.

Tenth. For the reason that the complaint herein wholly fails to state any cause of action.

Eleventh. For the reason that the facts stated in the  
107 special finding of facts heretofore made wholly fail to establish any cause of action against the defendants.

THOMAS M. HONAN, *Att'y Gen.*,  
STUART, HAMMOND & SIMMS,  
STOTSENBURG & WEATHERS,  
ROBY & WATSON,

*Att'ys for Defendants.*

108 *Plf's Objection to the Filing of the Governor's Motion in Arrest of Judgment Overruled and Exception.*

And the plaintiff now objects to the receipt and filing of the same for that Thomas R. Marshall as governor of the State of Indiana, is not a party to this action, and moves the same be not filed, which motion and objection of the plaintiff are overruled, to which the plaintiff excepts, and the said Thomas R. Marshall, as governor of the State of Indiana, is permitted to file and does file the last aforesaid motion, to which the plaintiff excepts.

*The Governor's Motion in Arrest Overruled and Exception.*

And now the Court overrules the said motion in arrest of judgment to which the said Thomas R. Marshall, as Governor of the State of Indiana, excepts.

*Plf's Motion for Judgment Sustained and Dfd's Exceptions.*

And now the plaintiff moves the court for judgment in his favor on the Conclusions of Law heretofore stated upon the Special findings of Fact, which motion is sustained by the court, to which the defendants severally and separately except.

"It is therefore, ordered, adjudged, and decreed by the court as follows:

*Judgment.*

First. That the defendant, Lew G. Ellingham, Secretary of State for the State of Indiana, and his successor and successors in office, be and he is hereby enjoined and restrained from certifying to the

clerk of each or any county in the State of Indiana not less than thirty (30) days before the general election to be held in the month of November, 1912, or at any time, the said proposed constitution set forth in Paragraph 2 of the Special Findings of Fact, or any question touching the same.

Second. That the defendants, Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, composing the State Board of Election Commissioners, and their successor and successors in office, be and they are jointly and severally enjoined and restrained from causing a brief statement or any statement of or concerning the said proposed new constitution set forth in Finding 2 above herein to be printed on the State Ballot or on any ballot or ballots to be by them or any of them or their successor or successors distributed and used by the electors of the State of Indiana at the next general election to be held in the State of Indiana, or any other election to be held in said state.

Third. It is further ordered and adjudged that the plaintiff recover of the defendants his costs and charges herein taxed at \$—.

*Appeal Prayed and Granted.*

And now the defendants pray an appeal to the Supreme Court of Indiana which appeal is granted by the court, on giving an appeal bond in the sum of One Hundred (\$100.00) Dollars with William H. Vollmer as surety thereon, which surety is now approved by the court.

And the court allows twenty (20) days within which time to file said bond and sixty (60) days herefrom within which time to file all bills of exception which may be tendered by either or any party to this action.

110 All of which is finally ordered, adjudged and decreed by the Court.

And afterwards to wit: On the 11th day of October, 1911, being the 9th juridical day of the October Term, 1911, of said court, before the same Hon. Judge thereof, the following proceedings were had herein, viz:

*Appeal Bond Filed and Approved.*

"Come the parties and the defendants file an appeal bond herein with William H. Vollmer as surety thereon which bond having been signed and approved by the Judge of this court is in the following words and figures to wit:

111 STATE OF INDIANA,  
*County of Marion, ss:*

In the Marion Circuit Court.

No. 20079.

JOHN T. DYE

vs.

LEW G. ELLINGHAM et al.

*Appeal Bond.*

Know all men by these presents that We, Lew G. Ellingham and William H. Vollmer, are held and firmly bound to John T. Dye, in the penal sum of One Hundred Dollars (\$100.) for the payment of which well and truly to be made and done we bind ourselves, our heirs, executors, administrators and assignees, jointly and severally, by these presents.

Sealed with our seals and dated the 6th day of October, A. D. 1911.

The condition of the above obligation is such that whereas heretofore, to-wit: on the 6th day of October, 1911, the said John T. Dye, in the Marion Circuit Court, recovered a judgment against the said Ellingham, et al., from which said judgment the said Ellingham and his co-defendants have taken an appeal to the Supreme Court of Indiana, now, if the said Ellingham, et al. shall and will do and prosecute said appeal and abide by and pay the costs which may be rendered against them, then the above obligation to be null and void; otherwise to remain in full force and virtue in law.

L. F. ELLINGHAM. [SEAL.]

M. H. VOLMER. [SEAL.]

Approved this 11th day of Oct., 1911.

CHARLES REMSTER, *Judge.*

112 STATE OF INDIANA,  
*County of Marion, ss:*

In the Marion Circuit Court.

No. 20079.

JOHN T. DYE

vs.

LEW G. ELLINGHAM et al.

*Præcipe.*

The Clerk will prepare and certify a transcript of the entire record in the above entitled cause for use on appeal to the Supreme Court of Indiana.

THOMAS M. HONAN, *Att'y General*;  
 STUART, HAMMOND & SIMMS,  
 STOTSENBURG & WEATHERS,  
 ROBY & WATSON,

*Attorneys for Defendants.*



113 STATE OF INDIANA,  
County of Marion, ss:

JOHN T. DYE, Plaintiff,

vs.

LEW G. ELLINGHAM, Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Def'ts.

*Clerk's Certificate.*

I, John Rauch, Clerk of the Circuit Court of Marion County, Indiana, do hereby certify that the above and foregoing transcript contains full, true, and correct copies of all the papers filed and entries of proceedings had in the above entitled cause as appears from the records in my office and as requested by the above and foregoing praecipe.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Indianapolis, this 16 day of October, 1911.

[SEAL.]

JOHN RAUCH,

*Clerk Marion Circuit Court.*

114 (Filed Nov. 11, 1911. J. Fred France, Clerk.)

In the Supreme Court of the State of Indiana.

LEW G. ELLINGHAM, as Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Appellants,

vs.

JOHN T. DYE, Appellee.

Appeal from Marion Circuit Court.

*Assignment of Errors.*

Appellants in the above entitled cause each jointly and severally say there is manifest error in the judgment and proceedings in this cause in this:

1st. The complaint does not state facts sufficient to constitute a cause of action.

2nd. The court had not jurisdiction of the subject matter of the action.

115 3rd. The court erred in overruling appellants' motion to require John T. Dye, R. K. Kane and A. C. Harris to produce and prove the authority under which they appeared for all the electors and for all the taxpayers of the State of Indiana, and for all the

people of the State, and for all the electors and other citizens of the State.

4th. The court erred in stating each of his conclusions of law on the special findings.

5th. The court erred in overruling appellants' motion in arrest of judgment.

6th. The court erred in overruling the motion of appellant, Thomas R. Marshall, as the Governor of the State of Indiana, in arrest of judgment.

Wherefore, appellants pray that said judgment be in all things reversed.

ROBY & WATSON,  
STOTSENBURG & WEATHERS,  
THOMAS M. HONAN,

*Attorney General;*

STUART, HAMMOND & SIMMS,  
*Attorneys for Appellants.*

(Filed Nov. 11, 1911. J. Fred France, Clerk.)

116 (Filed Nov. 11, 1911. J. Fred France, Clerk.)

In the Supreme Court of the State of Indiana.

LEW G. ELLINGHAM, as Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemer,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Appellants,

vs.

JOHN T. DYE, Appellee.

Appeal from Marion Circuit Court.

*Separate Assignment of Errors of Thomas R. Marshall, as Governor  
of the State of Indiana.*

The appellant, Thomas R. Marshall, as Governor of the State of Indiana, says there is manifest error in the judgment and proceedings in this cause in this:

1st. The complaint does not state facts sufficient to constitute a cause of action.

117 2nd. The court had not jurisdiction of the subject matter of the action.

3rd. The court erred in overruling appellants' motion to require John T. Dye, R. K. Kane and A. C. Harris, to produce and prove the authority under which they appeared for all the electors and for all the taxpayers of the State of Indiana, and for all the people of the State, and for all the electors and other citizens of the State.

4th. The court erred in stating each of his conclusions of law on the special findings.

5th. The court erred in overruling appellants' motion in arrest of judgment.

6th. The court erred in overruling the motion of appellant, as the Governor of the State of Indiana, in arrest of judgment.

Wherefore appellant prays that said judgment be in all things reversed.

ROBY & WATSON,  
STOTSENBURG & WEATHERS,  
THOMAS M. HONAN,

*Attorney General;*

STUART, HAMMOND & SIMMS,

*Attorneys for Appellant.*

(Filed Nov. 11, 1911. J. Fred France, Clerk.)

118 (Filed Nov. 11, 1911. J. Fred France, Clerk.)

In the Supreme Court of the State of Indiana.

LEW G. ELLINGHAM, as Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Appellants,

vs.

JOHN T. DYE, Appellee.

Appeal from Marion Circuit Court.

*Separate Assignment of Errors of Lew G. Ellingham, Secretary of  
State for the State of Indiana.*

The appellant, Lew G. Ellingham, as Secretary of State for the State of Indiana, says there is manifest error in the judgment and proceedings in this cause, to-wit:

1st. The complaint does not state facts sufficient to constitute a cause of action.

2nd. The court had not jurisdiction of the subject matter of the action.

119 3rd. The court erred in overruling appellants' motion to require John T. Dye, R. K. Kane and A. C. Harris, to produce and prove the authority under which they appeared for all the electors and for all the taxpayers of the State of Indiana, and for all the people of the State, and for all the electors and other citizens of the state.

4th. The court erred in stating each of his conclusions of law on the special findings.

5th. The court erred in overruling appellants' motion in arrest of judgment.

Wherefore, appellant prays that said judgment be in all things reversed.

ROBY & WATSON,  
STOTSENBURG & WEATHERS,  
THOMAS M. HONAN,

*Attorney General;*  
STUART, HAMMOND & SIMMS,  
*Attorneys for Appellant.*

(Filed Nov. 11, 1911. J. Fred France, Clerk.)

120 (Filed Nov. 11, 1911. J. Fred France, Clerk.)

In the Supreme Court of the State of Indiana.

LEW G. ELLINGHAM, as Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Appellants,

vs.

JOHN T. DYE, Appellee.

Appeal from Marion Circuit Court.

*Separate Assignment of Errors of Muter M. Bachelder, as Election  
Commissioner of the State of Indiana.*

The appellant, Muter M. Bachelder, as Election Commissioner of the State of Indiana, says there is manifest error in the judgment and proceedings in this cause, in this:

1st. The complaint does not state facts sufficient to constitute a cause of action.

121 2nd. The court had not jurisdiction of the subject matter of the action.

3rd. The court erred in overruling appellants' motion to require John T. Dye, R. K. Kane, and A. C. Harris, to produce and prove the authority under which they appeared for all the electors and for all the taxpayers of the State of Indiana, and for all the people of the State, and for all the electors and other citizens of the State.

4th. The court erred in stating each of his conclusions of law on the special findings.

5th. The court erred in overruling appellant's motion in arrest of judgment.

Wherefore, appellant prays that said judgment be in all things reversed.

ROBY & WATSON,  
STOTSENBURG & WEATHERS,  
THOMAS M. HONAN,

*Attorney General;*  
STUART, HAMMOND & SIMMS,  
*Attorneys for Appellant.*

(Filed Nov. 11, 1911. J. Fred France, Clerk.)

122 (Filed Nov. 11, 1911. J. Fred France, Clerk.)

In the Supreme Court of the State of Indiana.

LEW G. ELLINGHAM, as Secretary of State for the State of Indiana;  
Thomas R. Marshall, Muter M. Bachelder, Charles O. Roemler,  
Composing the State Board of Election Commissioners of the State  
of Indiana, Appellants,

vs.

JOHN T. DYE, Appellee.

Appeal from Marion Circuit Court.

*Separate Assignment of Errors of Charles O. Roemler, Election  
Commissioner of the State of Indiana.*

The appellant, Charles O. Roemler, as Election Commissioner of the State of Indiana, says there is manifest error in the judgment and proceedings in this cause in this:

1st. The complaint does not state facts sufficient to constitute a cause of action.

2nd. The court had not jurisdiction of the subject matter of the action.

123 3rd. The Court erred in overruling appellants' motion to require John T. Dye, R. K. Kane and A. C. Harris, to produce and prove the authority under which they appeared for all the electors and for all the taxpayers of the State of Indiana, and for all the people of the State, and for all the electors and other citizens of the State.

4th. The court erred in stating each of his conclusions of law on the special findings.

5th. The court erred in overruling appellants' motion in arrest of judgment.

Wherefore, appellant prays that said judgment be in all things reversed.

ROBY & WATSON,  
STOTSENBURG & WEATHERS,  
THOMAS M. HONAN,

*Attorney General;*

STUART, HAMMOND & SIMMS,

*Attorneys for Appellant.*

(Filed Nov. 11, 1911. J. Fred France, Clerk.)

124 And afterwards, to-wit: On the 14th day of December, 1911, the same being the 13th Judicial Day of the May Term, 1911, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by counsel, and the Court being advised in the premises, said cause is now submitted for decision, and notices thereof duly issued.

And afterwards, to-wit: on the 23rd day of January, 1912, the same being the 50th Judicial Day of the November Term, 1911, of said Supreme Court, the following further pleas were had herein:

Come now the Appellants by counsel, and file their brief in the words and figures following: (Here insert).

And afterwards, to-wit: on the 1st day of March, 1912, the same being the 83rd Judicial Day of the November Term, 1911, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the Appellee by counsel and files his brief in the words and figures following: (Here insert).

And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the Appellee by counsel, and files his petition for oral argument, in the words and figures following: (Here insert).

125 And afterwards, to-wit: on the 9th day of March, 1912, the same being the 90th Judicial Day of the November Term, 1911, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the Appellants by counsel, and file a petition herein for additional time in which to file reply briefs, in the words and figures following: (Here insert).

And on the same day the following further pleas and proceedings were had in said cause in said Court:

Come now the parties by counsel and the Court being fully advised in the premises, grants Appellants' petition heretofore filed herein for additional time in which to file reply brief for Appellants, and said time is extended to April 15, 1912.

And afterwards, to-wit: on the 26th day of March, 1912, the same being the 104th Judicial Day of the November Term, 1912, the following further pleas and proceedings were had herein:

Comes now the Appellants by counsel and files additional authorities (2), in the words and figures following: (Here insert).

And afterwards, to-wit: on the 1st day of April, the same being the 109th Judicial Day of the November Term, 1911, of said Supreme Court, the following pleas and proceedings were had herein:

Comes now the Appeller by counsel *and* files a petition to advance, in the words and figures following: (Here insert.)

126 And afterwards, to-wit: on the 6th day of April, the same being the 114th Judicial Day of the November Term, 1911, the following further pleas and proceedings were had herein:

Come now the Appellants by counsel and file their reply briefs in the words and figures following: (Here insert).

And on the same day the following further pleas and proceedings were had herein:

Come now the Appellants by counsel, and file a petition to advance, and for oral argument, in the words and figures following (Here insert):

And afterwards, to-wit: on the 10th day of April, 1912, the same being the 117th Judicial Day of the November Term, 1911, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the Appellants by counsel and file additional authorities, in the words and figures following. (Here insert).

127 And afterwards, to-wit: on the 16th day of April, 1912, the same being the 122nd Judicial Day of the November Term, 1911, of said Court, the following further pleas and proceedings were had herein:

Come now the parties by counsel, and the Court being advised in the premises, grants said petitions heretofore filed herein to advance, and orders that said cause be advanced.

And on the same day the following further pleas and proceedings were had herein:

Come the parties by counsel, and the Court being advised in the premises, sets the above cause for oral argument for April 24, and notices thereof are duly issued.

And afterwards, to-wit: on the 25th day of April, 1912, the same being the 130th Judicial Day of the November Term, 1911, of said Court, the following further pleas and proceedings were had herein:

Comes now the Appellee by counsel and files additional authorities, in the words and figures following: (Here insert).

128 And afterwards, to-wit: on the 5th day of July, 1912, the same being the 35th Judicial Day of the May Term, 1912 of said Supreme Court, the following further pleas and proceedings were had herein:

Come the parties by counsel and the Court being advised in the premises, affirms the judgment of the Court below, with the following opinion pronounced by Cox, Chief Justice, and a dissenting opinion pronounced by Morris, Judge, in which Spencer, Judge, concurs, in the words and figures following: (Here insert).

## 129 THE STATE OF INDIANA:

In the Supreme Court, May Term, 1912.

On the 5th day of July, 1912, being the 35th Judicial day of said May Term, 1912.

Hon. Charles E. Cox, Chief Justice; Hon. Leander J. Monks, Hon. Quincy A. Myers, Hon. John W. Spencer, Hon. Douglas Morris, Associate Justice.

No. 22064.

In the Case of

LEW G. ELLINGHAM, Secretary of State, et al.

vs.

JOHN T. DYE.

Appealed from the Marion Circuit Court.

(#20079.)

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Cox, C. J.

Morris, J., and Spencer, J., dissent with an opinion by Morris, J.

130 The general assembly at its regular biennial session held in 1911, drafted and incorporated in a bill what was therein termed a proposed new constitution which was a copy of the existing constitution with twenty-three amendments, or changes, of its provisions, and it provided that it should, if adopted, take effect on the first day of January, 1913. There was no pretense of complying with a proceeding under the provisions of the present constitution for amendment of it. The bill duly passed both branches of the legislative body with the usual formalities of ordinary legislation, was approved by the governor March 4, 1911, and published with the acts of the session as Chapter 118, on page 205. It is therein provided that the proposed organic instrument shall be submitted to all the legal voters of the state at the general election regularly to be held pursuant to law in November, 1912; and to that end it is provided that the state board of election commissioners shall prepare ballots as provided by law and that all election officers and other officials required by law to perform any duties with reference to general elections shall perform like duties with reference to the submission of the so-called proposed new constitution.

Certain ministerial duties are devolved upon the secretary of state and the state board of election commissioners in relation to elections which must apply to the submission of this proposed organic legislation to the people, if the act in question is a valid exercise of legislative authority. If it is, on the contrary, in violation of the exist-



ing constitution, then they have no duty to perform in relation thereto.

This suit was instituted in the trial court by the appellee, a voter and taxpayer of Marion County, suing for himself as a citizen, elector and taxpayer, in the State of Indiana, and also on behalf and for the benefit of all the other citizens, electors and taxpayers in the state to enjoin the appellant, Ellingham, as secretary of State, and the appellants, Marshall, Bachelder and Roemler, constituting the board of election commissioners, from the performance of these duties on the ground that the general assembly was without power to thus prepare and submit to the people proposed fundamental law, whether an entire new constitution or amendment; that the method of submission provided was in violation of a provision of our state constitution; and that certain provisions of the proposed organic law are violative of provisions of the act of Virginia conveying to the United States the territory northwest of the Ohio River, the Ordinance of 1789, the act of Congress of 1816 to enable the people of the Indiana Territory to form a state constitution and 1301<sup>2</sup> government, and section 4 of article 4 of the Federal constitution in the matter of guaranties; of the principle of proportionate representation and of a republican form of government.

After a hearing and argument in that court memorable in the legal annals of the state, the learned judge of the circuit court sustained the contention of appellee in every respect and enjoined and restrained appellants as prayed. From that judgment this appeal comes, and the delicate and difficult questions involved are presented to this court for final determination.

The underlying question involved, out of which all the others presented grow, is simply whether the act printed as Chapter 118 is a valid exercise of legislative power by the general assembly.

On this question the appellants contend that the act involves the submission of a new constitution to the people for adoption or rejection and that the general assembly is clothed with power to initiate, draft and submit a new constitution to the people in such form and manner as to enable them to adopt it as the organic law of the state. This power, it is asserted, is included in the general grant of the legislative power of the government instituted by the existing constitution which is made to the general assembly by section 1 of article 4 of that instrument which provides that "The legislative authority of the State shall be vested in the general assembly."

The appellee, on the contrary, in support of the conclusion of the trial court that the act in question is unconstitutional and void, contends that the power to initiate, frame and submit to the people fundamental law is not legislative power in the sense in which the general assembly is vested with legislative power by that provision. But the making of fundamental law being essentially different from ordinary legislation, the power of the general assembly in relation to it is measured by the special and limited grant of power to it, made by article 16 of the present constitution, to initiate, frame

and submit amendments in the mode and manner therein provided; and that this by necessary implication withholds the right of the broader and more comprehensive exercise of the power to so participate in fundamental legislation involved in initiating, preparing and submitting a new constitution.

Appellee also contends that the draft embodied in Chapter 118 is not that of a new constitution, but that it is in substance, truth and fact merely proposed amendments of the existing constitution, and

that therefore it can not be lawfully submitted to the people  
131 for their action because of non-compliance with the requirements of article 16.

In that remote and despotic period when the sovereign king chartered rights and liberties to his subjects, the people, all governmental powers were assumed to be his by divine right. In him were combined the legislative, executive and judicial powers of government; he was law giver, interpreter and enforcer; when the powers were executed by agents, the agents were his and responsible to him alone. On this continent we came to the time when the people, by revolution, took to themselves sovereignty and in exercising supreme political power, chartered governments by written constitutions. These organic instruments declared and guaranteed the rights and liberties of the individual, which had come to the people through centuries of struggle against absolutism in government. The majority was to rule but under restraints and limitations which preserved to the minority its rights. "By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental." Cooley's Constitutional Limitations, 7th Ed. p. 56. The government so instituted was representative of the creator of it, the people. The agencies and agents for administering it were the people's agents. For greater surety of the maintenance of rights and liberties and against encroachment and abuse of power the governmental power inhering in the people was divided, and the three elements of it, the executive, legislative and judicial authority, in so far only as the people deemed it wise and were willing to surrender or delegate power to agents, were delegated for exercise in the matter of carrying out the details of the purpose of government to three separate and distinct departments or agencies, independent of each other except to the extent that the action of one was made to constitute a restraint to keep the others within proper bounds, and to prevent hasty and improvident action.

Under such a constitution the general assembly of our state is clothed with legislative authority in the words of section 1 of article 4 quoted above. That the general assembly is supreme and sovereign in the exercise of the law-making power thus conferred upon it, subject only to such limitations as are imposed, expressly or by clear implication, by the state constitution and the restraints of the Federal constitution and the laws and treaties passed and made pursuant to it, has been uniformly declared by an unbroken line of

132 decisions of this court from the beginning of the judicial history of the state to the present. But this general grant of authority to exercise the legislative element of sovereign power has never been considered to include authority over fundamental legislation. It has always been declared to vest in the legislative department authority to make, alter and repeal laws, as rules of civil conduct pursuant to the constitution made and ordained by the people themselves and to carry out the details of the government so instituted.

"The legislative power we understand to be the authority, *under the Constitution*, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed." Cooley's Constitutional Limitations, 7th Ed. p. 131.

The legislative power which the general grant in our constitution bestows upon the general assembly, this court has held to be the power to make, alter and repeal laws. *State ex rel. v. Denny*, 118 Ind. 382, 387; *City of Evansville v. State, ex rel.*, 118 Ind. 426; *State ex rel. Holt, v. Denny*, 118 Ind. 449; *State ex rel. v. Hyde*, 121 Ind. 26.

In *La Fayette etc., R. Co. v. Geiger*, 34 Ind. 185 at page 198 it was said by Buskirk, J.:

"When the constitution of a state vests in the General Assembly all legislative power, it is to be construed as a general grant of power, and as authorizing such legislature to pass any law within the *ordinary functions of legislation*, if not delegated to the federal government or prohibited by the state constitution."

The grant to the general assembly of "the legislative authority of the state" did not transfer from the people to the general assembly all the legislative power inhering in the former but, as said in *McCullough v. Brown*, 41 S. C. 220, 23 L. R. A. 410, only "such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose."

The words "legislative power" in a constitutional delegation of general legislative authority "mean the power or authority under the constitution or frame of government, to make, alter and repeal laws." *O'Neil v. Am. Fire Ins. Co.* 166 Pa. St. 72; 26 L. R. A. 715.

To erect the State, to institute the form of its government, is a function inherent in the sovereign people; to carry out its purpose of protecting and enforcing the rights and liberties of which the ordained constitution is a guaranty by enacting rules of civil 133 conduct relating to the details and particulars of the government instituted, is the function of the legislature under the general grant of authority. It needed no reservation in the organic law to preserve to the people their inherent power to change their government against such a general grant of legislative authority; and yet we find in the first section of the first article of the constitution this statement of the purpose of the government which they had builded, and the declaration of their power over it:

"We declare that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."

With knowledge of the tendency of vested power to broaden and exalt itself, the people have declared their abiding power over the framework of the government, while in section 1 of article 4 they gave into the hands of an agency, the authority to exercise all their power to make laws to carry out the declared purpose of the government, save such as they had withheld by express or implied limitations, or, had surrendered to the federal government.

A state constitution has been aptly termed a legislative act by the people themselves in their sovereign capacity, and, therefore, the paramount law. Cooley's *Constitutional Limitations*, 7th Ed. p. 242; *Sill v. Corning* 15 N. Y. 297, 303. It has again been defined to be "an act of extraordinary legislation by which the people establish the structure and mechanism of their government." *Eakin v. Raub*, 12 Serg. & R. 330, 347. In *Sage v. Mayor*, 154 N. Y. 61; 38 L. R. A. 606, a constitution is designated as a supreme enactment, a fundamental act of legislation by the people of the state.

A constitution is legislation direct from the people acting in their sovereign capacity, while a statute is legislation from their representatives, subject to limitations prescribed by the superior authority. *People v. May*, 3 Mich. 598.

Jameson, in his work on *Constitutional Conventions*; a work which has evoked the unqualified approval of Judge Cooley in his *Constitutional Limitations*, in discussing the difference between fundamental and ordinary legislation, says on pages 134 to 135 and 84 to 86:

"Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional and in the nature of temporary expedients. Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operations and the apparatus of checks and balances proper to insure its integrity and continued existence. Fundamental laws are primary, being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. Ordinary laws are secondary, being commands of the sovereign, having reference to the exigencies of time and place resulting from the ordinary working of the machine. Fundamental laws precede ordinary laws in point of time, and embrace the settled policy of the state. Ordinary laws are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws and

express, as we have said, the expedient, or the right viewed as the expedient, under the varying circumstances of time and place. \* \* \* fundamental laws are either structural, or expressive of the *settled policy* of the state; and second, that they may, consequently, be, as they theoretically are, laid down in advance, for ages to come; whilst, on the contrary, ordinary laws are merely temporary expedients or adjustments, and cannot be allowed to stiffen into constitutional provisions without extreme danger to the commonwealth; that, in other words, they have no place in a Constitution, and, therefore, as will be more fully shown in a subsequent chapter, are not proper subjects for the action of bodies charged with framing Constitutions."

And again in discussing the powers of a legislature he says on page 359:

"It is the body which pronounces the statute law of the State. All measures relating to the conduct or to the rights of individuals, to the administration, or defence of the government, which are not prohibited by the fundamental law or by the moral code, and which yet are deemed, on a large view of the public interests, to be expedient, are within the competence of a legislature with the general powers of legislation conferred by our Constitutions.

135 "To this general statement of the extent of the power of our legislature, the *proviso* must be appended, that the measures passed by those bodies must not be of the character denominated fundamental. The necessity of this *proviso* is apparent from the character of the American governments, before referred to, as distinguished from that of Great Britain, after which they were modelled. The Parliament of Great Britain is possessed of all legislative powers whatsoever. It can enact ordinary statutes, and it can pass laws strictly fundamental. Not so with our legislatures. Saving the single case, to be noted in a subsequent chapter, in which by express constitutional provision, they act in conventional capacity, in the way of recommending specific amendments to their Constitutions, they have no power whatever to amend, alter or abolish those instruments. Subject, however, to this limitation, a legislature, under our system, may expatiate through the whole domain of the expedient, as fully as the sovereign itself could do, were it to act in person. The propriety of such an adjustment of powers is apparent from the consideration, that whatever is expedient to be done, within the limits imposed by the fundamental law, and whatever, therefore, it may presume the sovereign, in the case supposed, would order to be done, some agency, in all governments pretending to be adequate to perpetuate their own existence, must have authority to do. The formation and establishment of the fundamental law is, in all the American Constitutions, regularly the work of Conventions acting in conjunction with the electors. On the other hand, no fact is better settled than that, beyond the province thus specially set apart for them, neither Conventions nor the bodies of electors have any legislative power. They can either of them pass any law comprised within the sphere of ordinary legislation."

In *State v. Cox*, 3 Eng. (Ark.) 436, 443, in a discussion of the powers of a legislature it was said: "Among the general powers of the legislative department, is that of passing any law not inconsistent with the Constitution of the United States or of the State; \* \* \* The General Assembly, in amending the constitution, does not act in the exercise of its ordinary legislative authority of its general powers; but it possesses and acts in the character and capacity of a convention, and is, *quoad hoc*, a convention expressing the supreme will of the sovereign people." This language of the Supreme Court of Arkansas meets the approval of Jameson in his work on Constitutional Conventions on page 586 where it is said that, "It expresses with admirable brevity, force, and clearness, the true doctrine in regard to the power of our General Assemblies under similar clauses of our Constitutions."

In *Eason v. State*, 6 Eng. (Ark.) 481, the case of *Cox v. 136 State* was reviewed and the conclusion there reached, that the legislature, not under its general grant of authority, but under the special grant of power over amendments to the constitution, might amend a section of the Bill of Rights, was denied. In the latter case, however, it was held that no power was in the possession of the legislature to repeal or change any provision of the Bill of Rights, "when acting either in the exercise of ordinary legislative authority, or in the exercise of the higher power specifically granted" to participate in the amendment of the constitution; and that such change could only be made by the people through the agency of a convention.

In *City of Chicago v. Reeves*, 220 Ill. 274, it is said on page 288: "The right to propose amendments to the Constitution is not the exercise of the legislative power by the General Assembly in its ordinary sense, but such power is vested in the legislature only by the grant found in the constitution, and such power must be exercised within the terms of the grant."

In *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 514, we find the following expression of the Supreme Court of California:

"It should be remembered that the legislature, in proposing amendments to the constitution, is not exercising legislative power. Such is the ruling of this court in *Hatch v. Stoneman*, 63 Cal. 632, where it is held that the governor has nothing to do with such proposals.

"The power given to the legislature is a grant of power. It has it not without the constitutional provision. The grant is given to be exercised in the mode conferred on the legislature by the constitution. It is so limited by the people acting in the exercise of their highest sovereign power. In such case, the mode is the measure of the power. Its action outside of the mode prescribed is as much a nullity as that of a board of supervisors of a city outside of the statute defining its power in regard to the grading of a street. The rule forcibly stated by Justice Coleridge in *Christie v. Unwin*, 3 Perry & D. 208, as applicable to powers conferred by statute, is just as applicable here, for the constitutional provision is a statute ordained by a people as part of its paramount law. However high

the authority,' says the learned Justice, in the case just cited, 'to whom special statutory power is delegated, we must take care that in the exercise of it, the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the lord chancellor as to any order of petty sessions.' The legislature, acting outside of the constitution, is without jurisdiction and its action null."

137 In a later decision of that court in the case of *Livermore v. Waite*, 102 Cal. 113, it was held that the power of the legis-

lature to initiate any change in the existing organic law was a delegated power to be strictly construed, under the limitations by which it was conferred and that it was not authorized to assume the functions of a constitutional convention. It was said that, "In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power conferred upon it by the people. \* \* \* The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms."

In *Holmberg v. Jones*, 7 Idaho, 752, it was said by the Supreme Court of Idaho:

"The power to propose amendments has been granted by the people to the legislature. While the power of the legislature to enact laws is inherent, so far as legislative enactment is concerned, yet the power to propose amendments to the constitution is not inherent. The power to make constitutions and to amend them is inherent, not in the legislature, but in the people."

The Supreme Court of Missouri in the case of *Edwards v. Lesueur*, 132 Mo. 410, which was a suit to enjoin the secretary of state from discharging his duties in relation to the submission of constitutional amendments claimed to be invalid, said on page 433:

"It is true the general assembly can only propose amendments under the power delegated to it by the people. This power must be construed according to the general principles which govern courts in the construction of delegated powers. In the exercise of such power every substantial requirement must be observed and followed or there can be no valid amendment. In respect to the mode of proposal and submission, the provisions of the constitution must be regarded as absolute. The courts should not hesitate to see that the constitution is obeyed in these particulars."

And again on page 441:

"The general assembly in proposing amendments does not, strictly speaking, exercise ordinary legislative power. It acts in behalf of the people of the state under an express and independent power. The mode of its exercise is prescribed and must be observed."

138 In the case of *Commonwealth v. Griest*, 196 Pa. St. 390, 50 L. R. A. 568, the Supreme Court of Pennsylvania directed a writ of mandamus to issue to compel the secretary of state to per-



form his statutory duties in submitting an amendment which he had refused to discharge because the governor had vetoed the amendment, and the court held that neither veto nor signing by the governor could effect such proposed amendment; as amending the constitution was not law-making. It was said that the article of their constitution, similar to ours, which vested generally the legislative authority in the general assembly did not cover fundamental legislation. But it was said, "On the contrary, the entire article is confined exclusively to the subject of legislation; that is, the actual exercise of the law-making power of the Commonwealth in its ordinary acceptance." And it was said of the provision which empowered the legislature to frame and submit amendments of the constitution: "It is constitution-making, it is a concentration of all the power of the people in establishing organic law for the Commonwealth. \* \* \* It is not law-making, which is a distinct and separate function, but it is a specific exercise of the power of a people to make its constitution."

The same coercive writ was issued to compel the governor of Maryland to discharge a duty placed on him to order publication of proposed amendments as a preliminary requirement to their submission to the voters, which he refused to discharge because, he claimed, they were inoperative for not having been submitted to him for approval. It was held by the supreme court of that state that a proposal to make change in the organic law was not legislation in the ordinary sense and that it was not necessary to submit them to the governor for any action. *Warfield, Governor, v. Vandiver*, 101 Md. 78.

The Supreme Court of Nebraska in *Re Senate File 31*, 25 Neb. 864, said: "It will be conceded that under our constitution it is unnecessary to submit a proposition to amend the constitution, duly passed by each branch of the legislature to the governor for his approval, as such proposition is not ordinary legislation."

In the Massachusetts Convention of 1820, Mr. Webster and Mr. Lincoln took the position that conferring the power on the legislature to prepare and propose amendments to the constitution was not giving authority to exercise legislative power in the ordinary sense; the former saying: "This was not an exercise of legislative power—it was only referring to some branch of the power of making propositions to the people." While the words of the latter were: "The proposing of amendments was not a subject of legislation."

*Deb. Mass. Conv. 1820*, pp. 405, 407.

139 Quoting again from Jameson on Constitutional Conventions in differentiating the functions of legislatures and conventions with relation to the species of law over which they have power it is said on page 122:

"Of these two species of law, the distinction between which has been already explained, it is the important thing to note, that the one denominated fundamental is, generally speaking, the work only of a convention, a special and extraordinary assembly, convening at no regularly recurring periods, but whenever the harvest of constitutional reforms has become ripe; while, on the other hand, the ordi-



nary statute law, whose provisions are tentative and transient, is, regularly at least, the work of a legislature,—a body meeting periodically at short intervals of time. It is thoroughly settled that, under our Constitutions, State and Federal, a legislature cannot exercise the functions of a Convention,—cannot, in other words, take upon itself the duty of framing, amending or suspending the operation of the fundamental law."

And again he says in page 211, "That, whenever a Constitution needs a general revision, a Convention is indispensably necessary." And in consonance with the principle that legislatures in their ordinary legislative capacity are not competent to frame or draft organic law are these words of Cooley: "In accordance with universal practice, and from the necessity of the case, amendments to an existing constitution, or entire revisions of it, must be prepared and matured by some *body of representatives chosen for the purpose*." Where authority is specifically granted to the legislature by the constitution to prepare and submit amendments, that establishes their competency, and, to the extent of the specific authorization and within its limitation they are always to be considered as chosen for the purpose.

Many of the constitutions, made and ordained in the early days of written constitutions in our country, were silent on the question of future changes and we are informed by Jameson at page 548:

"But silence upon a subject of such importance was liable to misconstruction, and was therefore dangerous. Hence the policy of regulating by express constitutional provisions the exercise of so important a power soon began to be generally apparent. In several of the States the clauses of the Constitutions relating to amendments have been couched in negative terms, interdicting amendments except in the cases and modes prescribed. In a majority of cases, however, they have been permissive, pointing out modes in which Conventions may be called, or specific amendments effected, without terms of restriction, or allusion to other possible modes."

"But however liberal these provisions may seem to be, restriction is really the policy and the law of the country. By the common law of America, originating with the system we are considering, and out of the same necessities which gave the latter birth, it is settled, that amendments to our Constitutions are to be made only in modes pointed out or sanctioned by the legislative authority, the legal exponent of the will of the majority, which alone is entitled to the force of law. The mode usually employed is that of summoning a Convention; and it is clear that no means are legitimate for the purpose indicated but Conventions, unless employed under an express warrant of the Constitution. The idea of the people thus restricting themselves in making changes in their constitution is original, and is one of the most signal evidences that amongst us liberty means, not the giving of rein to passion or to thoughtless impulse, but the exercise of power by the people for the general good, and, therefore, always under the restraints of law."

"But, while the framers of our Constitutions have sought to avoid the dangers attending a too frequent change of their fundamental codes, they have adverted to an opposite danger, to be equally

shunned—that of making amendments too difficult. With a view to obviate this danger, in all our late Constitutions there have been inserted special provisions, the tenor of which will be explained hereafter. The general principle governing their selection, and, in truth, lying at the foundation of the whole subject, as a branch of practical politics, is this: Provisions regulating the time and mode of effecting organic changes are in the nature of safety-valves,—they must not be so adjusted as to discharge their peculiar function with too great facility, lest they become the ordinary escape-pipes of party passion; nor, on the other hand, must they discharge it with such difficulty that the force needed to induce action is sufficient also to explode the machine. Hence the problem of the Constitution-maker is, in this particular, one of the most difficult in our whole system, to reconcile the requisites for progress with the requisites for safety. This problem cannot be yet regarded as solved, though we are doubtless approximating to a solution. Every new Constitution gathers up the fruits of past experience, and in turn contributes something to the common stock. We have reached such a stage that the provisions of our latest Constitutions may be considered as adequate to all ordinary exigencies of our condition. No community of American citizens would be badly provided for, were it compelled to accept  
 141 any one of a score of Constitutions now in force amongst us, without modification, save in subordinate particulars touching local matters.”

The author's conclusion is, that the change or amendment of the written constitutions which prevail under the American system is confined to two modes. First by the agency of conventions called by the general assembly in obedience to a vote of the people and usually pursued when a general revision is desired; and second, through the agency of the specific power granted to the general assembly by constitutional provision to frame and submit proposed amendments, which is considered preferable when no extensive change in the organic law is proposed. And, it is scarcely necessary to add, the proposed fundamental law must be regularly ratified by the people. *Ibid.*, pp. 550, 611, 612.

Accompanying the grant of general legislative authority over the subject-matter of ordinary legislation found in section 1 of article 4, our constitution in article 16 places with the legislature the following special power and duty in relation to fundamental legislation:

“SEC. 1. Any amendment or amendments to this constitution may be proposed in either branch of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the general assembly to be chosen at the next general election; and if, in the general assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such amendment or amendments to the electors of the state; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution.

"SEC. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately; and while an amendment or amendments which shall have been agreed upon by one general assembly shall be waiting the action of a succeeding general assembly, or of the electors, no additional amendment or amendments shall be proposed."

The presence of this article in the constitution fights against the contention that the general grant of legislative authority bears in its broad arms by implication any power to formulate and submit proposed organic law whether in the form of an entire and complete instrument of government to supersede the existing one or single amendment. For if the general assembly have the greater power, unfettered power, under the general grant, what necessity could there have existed for giving the lesser, special power with the checks and limitations accompanying it? That both the general grant of legislative authority and the special authorization to act in relation to amendments were deemed necessary by the framers of the constitution arises from the obvious fact that each involved a different subject-matter: the one, of ordinary law-making and the other, the change of organic law. The one involved, necessarily, a broad discretion while the other merely gave a narrow, limited power, under guard, to aid the people in the exercise of their sovereign power over the structure of their government.

In *Morris v. Powell*, 125 Ind. 281, which involved the validity of a registration law, it was said by Elliott, J., on page 311:

"The question is one of power. If the constitution authorizes such enactments as those contained in section 13. The power exists, and the section must stand; if the Constitution does not authorize such a law, the power does not exist, and the section must fall. \* \* \* The power which the General Assembly assumed to exercise is not an ordinary legislative power, for, in assuming to legislate upon the subject of the qualification of voters that body entered into the domain of those in whom original power resides, and from whom all legislative powers are derived. The people control the subject of the right of suffrage, and legislative assemblies have only such power over that subject as the people have granted them by the organic law."

And it may be said with far greater force, that in assuming to legislate in relation to structural changes in the government, the legislature is not acting within the power it takes under the general grant of authority to enact, alter and repeal laws under and pursuant to the constitution. For, to deal with organic law,—to determine what it shall be, when it needs change, the character of the change and to declare and ordain it,—is peculiarly a power belonging to the people, and this fact they have declared, as we have seen, in the first section of the Bill of Rights.

The constitutional and legislative history of the state bears the strongest witness against the contention that the general grant of legislative authority carries the power to formulate and submit, at will, fundamental law to the people for their action. Power over the

143 constitution and its change, has ever been considered to remain with the people alone, except as they had, in their constitution, specially delegated powers and duties to the legislative body relative thereto for the aid of the people only.

As illustrating the extent and boundaries of the general grant of legislative power in its relation to framing organic law it is worth while to briefly review those enactments which have given and continued the life of our State.

The Act of Congress of May 7, 1800, carved out of the Northwest Territory, Indiana Territory, and established a government for it similar to that of the Northwest Territory to begin its existence July 4th, 1800. (R. S. 1843, p. 28.) The Ordinance of 1787, providing for the government of the Northwest Territory, provided that the legislative department "shall have authority to make laws, in all cases for the good government of the district not repugnant to the principles and articles in this ordinance established and declared." (R. S. 1843, p. 23.)

When the embryo state was ready to take its place with the sisterhood of states there was no assumption that its legislature was competent to form a constitution for the people of Indiana Territory. On April 19, 1816, Congress passed an act to enable the people of Indiana Territory "to form for themselves a constitution and state government." And for this purpose the qualified voters of the territory were authorized to choose representatives to form a convention, which body was authorized to meet at the seat of government on the second Monday of June, 1816, and first determine whether it was expedient at that time to form a constitution and state government; and it was provided that "if it be determined to be expedient, the convention shall be, and hereby are, authorized to form a constitution and state government \* \* \* provided, that the same, \* \* \* shall be republican, and not repugnant to" the Ordinance of 1787. (R. S. 1843, p. 33.) Obviously it was not thought then, that forming a constitution was included in the power to enact ordinary legislation or which it was proper to bestow upon a legislative body not specifically selected for that purpose. But it was recognized as a power residing in the people, and to be exercised by them, in the one facile and practical way, through representative agents selected by them for the very purpose. Under this authority and in this mode the people of the territory formed and ordained the first constitution of the state.

The first section of article 3 of that instrument vested the legislative authority of the new state in the general assembly in the same words that the grant is made to it in the existing constitution.

144 In relation to changes in the organic law, article 8 of the constitution of 1816 provided:

"Every twelve years after this constitution shall have taken effect, at the general election held for governor there shall be a poll opened in which the qualified electors of the State shall express by vote whether they are in favor of calling a convention or not. And if there shall be a majority of all the votes given at such election in favor of a convention the Governor shall inform the next General

Assembly thereof, whose duty it shall be to provide by law for the election of the members to the convention, the number thereof and the time and place of their meeting, which law shall not be passed unless agreed to by a majority of all the members elected to both branches of the General Assembly, and which convention, when met, shall have the entire power to revise, amend or change the constitution."

In 1828, pursuant to the foregoing provisions, the legislature submitted to the people the question as to whether or not a constitutional convention should be called. Only ten of the fifty-eight counties in the State appear to have voted upon the question, the total vote being, for a convention 3,496, against a convention 6,130. The people, therefore, affirmatively determined that no convention should be called. In 1840, at the end of the next twelve year period, the question was again submitted to the people, pursuant to the terms of article 8, the vote being, for a convention 12,277, against a convention 61,721, sixty-nine counties having participated in this vote, fourteen counties making no return thereon. In the face of this vote, five to one against the calling of a constitutional convention, the legislature in 1846, not in accordance with, but independently of the terms of article 8, again submitted the question to the people at which time the vote resulted, for a convention 33,175, against a convention 28,842, in a total of 126,123 votes cast at the election.

By recurring to article 8 it will be perceived that in order to authorize the calling of a convention a majority of the votes cast at an election held for the governorship must have been cast in favor of the convention. Inasmuch, therefore, as all of the votes cast, both for and against the calling of a convention, in 1846, fell short of a majority of the votes cast for governor at that election, the people failed to vote in favor of the calling of a constitutional convention.

Notwithstanding the people had upon these three separate occasions either voted against, or failed to vote by the required majority in favor of calling a convention, the legislature in 1849 again submitted the question for determination. (See Acts of 1849, p. 36), at the annual election in August, 1849, at which the total vote cast for governor was 149,774, (excluding Fayette County which seems not to have made return of its vote). There was cast in favor of the convention 81,500 votes; against it 57,418 votes, showing a majority over all votes cast of 6,612.

Pursuant to the authority given by this vote of the people the general assembly by an act approved January 18, 1850, Acts 1850, p. 29, provided "for the call of a convention of the people of the State of Indiana, to revise, amend, or alter the constitution of said State." The body selected by the people as provided in that act formed the Constitution which was submitted to and adopted by the people and has existed as the organic law, without radical change for more than sixty years. During the time when these persistent efforts of the general assembly to get a vote of the people favorable to a revision or amendment of the constitution by a convention,

the obviously concordant opinion of the strong men of the time was that it could only so be made, and be made within the law. Had it been thought then, that the general grant of legislative authority placed in the hands of the general assembly the power to accomplish the same work which that body was asking the people to authorize a constitutional convention to do, it is not to be supposed that the fruitless efforts to secure a convention would have continued. But on the contrary it is highly probable that the general assembly would itself have done the work of revision or framing amendments and thus have avoided the delay and the greater expense entailed by a convention. No one then claimed that the framing of fundamental law might be done by legislative act under the general grant of legislative authority. Even though the grant to the general assembly of special authority to participate to a degree in organic law-making and the specific duty of submitting every twelve years the question of whether the people desired a convention called, was, as to time, departed from by the general assembly in 1846 and in 1849, they still looked to the people, in whom the right inhered and who alone could put life into fundamental enactments, for instruction and discretion; and answering the mandate of the people's vote, they merely arranged the details for the selection by the people of a body of representatives for the special duty of drafting a revised or amended constitution.

As we have seen, the provision of the existing constitution which vests legislative authority in the general assembly is identical 146 with that of the constitution of 1816. And if the construction put upon the provision by the people and the legislative department during the thirty-four years under the latter governmental instrument, excluded any grant of power to frame a new constitution, it would seem that such construction was carried with it into the present constitution. For, it is a canon of construction that when the words of a statute, fundamental or ordinary, are brought forward into a new one, there comes with it the meaning which it then has. *State v. Ensley*, 97 N. E. 113; 8 Cyc. 739.

Manifestly the framers of the present constitution and the people of the state of that time did not understand that the grant of authority in section 1 of article 4 empowered the general assembly to frame a new constitution and submit it in the manner proposed, in whole or in part. Had it carried that power in its words, no necessity could there have been for article 16 which specifically grants power to the legislature to frame and propose amendments in a more difficult mode and so participate with the people in fundamental enactments. Great and illustrious men were among the membership of the Constitutional Convention of 1850; men who subsequently occupied the highest offices in the gift of the people of the state, executive and judicial, and who served the state and nation in exalted places in the federal government. But no public service of any of them has proven of greater or more lasting benefit to the people than the organic law which they framed. It is inconceivable that they intended that the general grant of legislative authority should vest in the general assembly plenary power to draft

a new constitution, and provide for its submission to the people at the same session and in the same constitution throw around the preparation and submission of a single amendment, the restrictions requiring time for discussion, consideration, and deliberation involved in article 16. An examination of the journal and debates of that body shows that provisions were offered by two different members to be embodied in the revised constitution, which would permit future changes in the constitution to be framed by the general assembly and submitted to the people at the ensuing general election, just as it is sought to be done by the act under consideration. That they received little favorable consideration from the convention appears from the expressed thought, and the action of that body on the subject-matter, which is gathered from its journal and debates.

In the first days of the convention it appears on page 66 of the journal of that body that Mr. Tague, a member from Hancock County, offered a resolution to amend article 8 of the existing constitution to permit the legislature at any regular session to propose one amendment to be published with the laws and submitted to a vote of the people at the next general election, and if approved by two-thirds of the votes cast to become a part of the constitution. And it appears on page 68 that Mr. Steele, the member from Wabash County, introduced a resolution relating to an amendment of the constitution reading as follows:

"Resolved, that the committee on future amendments to the Constitution, inquire into the expediency of so amending the Constitution, that hereafter at any time when the citizens of Indiana present to the Legislature a petition or memorial with fifty thousand signers praying for an amendment to the Constitution, setting forth specifically such amendment, that the Legislature shall provide by law for the said citizens to vote on such proposed amendment, and if adopted, become a part of the Constitution, and be engrafted by the next Legislature into the Constitution."

On page 69 of the Journal we find that Mr. Frisbie, the member from Perry County, presented a resolution requiring the same committee to inquire into the expediency of inserting a provision for amendment substantially as follows:

"That whenever the Legislature shall become satisfied that a majority of the people of the State are dissatisfied with any portion of the Constitution, it shall be their duty, by joint resolution or otherwise, to present to the voters of the State, in a distinct form, such proposed change or changes to be acted upon by the voters at the polls at the next general election, and if a majority of all the votes given at such election be given in favor of such change or changes and so made to appear to the next ensuing Legislature, it shall be the duty of the Executive to issue his proclamation declaring said amendment or amendments to be a part and parcel of the Constitution."

Later in the existence of the convention as we find on page 444 of the Journal, Mr. Read of Clark County, submitted a resolution embodying a proposed article relating to future amendments, which gave power to the legislature to propose amendments if agreed to

by two-thirds of the members elected to each house and approved by the governor; they were then to be published in at least one newspaper in each county for three months before the next general election, and, if the legislature then chosen should approve them by a majority of the members elected to each house, they were  
 148 to be again published, and submitted to a vote of the electors, and, if ratified by a majority, to become a part of the constitution. But it also provided that amendments should not be so proposed oftener than once in ten years.

These resolutions all went by reference to the committee on future amendments, and that committee reported to the convention, and recommended for passage by it as a part of the amended constitution, the following article in two sections:

"SEC. 1. Whenever two-thirds of all the members elected to each branch of the General Assembly shall think it necessary to call a Convention to alter or amend this Constitution, they shall recommend to the electors at the next election of members of the General Assembly to vote for or against a Convention; and if it shall appear that a majority of all the electors of the State voting for representatives have voted for a Convention, the General Assembly shall, at its next session, call a Convention for the purpose of revising, altering or amending this Constitution.

"SEC. 2. Any amendment or amendments to this Constitution may be proposed in either branch of the General Assembly, and if the same shall be agreed to by two-thirds of all the members elected in each of the two houses, such proposed amendment or amendments shall be referred to the next regular session of the General Assembly, and shall be published at least three months previous to the time of holding the next election for members of the House of Representatives; and if at the next regular session of the General Assembly after said election, a majority of all the members elected in each branch of the General Assembly shall agree to said amendment or amendments then it shall be their duty to submit the same to the people at the next general election for their adoption or rejection in such manner as may be prescribed by law; and if a majority of all the electors voting at said election for members of the House of Representatives shall vote for such amendment or amendments, the same shall become a part of the Constitution. If two or more amendments be submitted at the same time, they shall be submitted in such manner that the people shall vote for or against each of such amendments separately, and while an amendment or amendments which has been agreed upon by one General Assembly is waiting the action of a succeeding Assembly, or undergoing the final consideration of the people, no additional amendment or amendments shall be proposed."

The report of the committee was concurred in and the article was passed to a second reading. (Convention Journal, p. 693.) When

the article came up on second reading Mr. Bascom, the member  
 149 from the district of Adams and Wells Counties, unsuccessfully moved to strike out section 1 and insert the following:

"SEC. 1. Every sixteenth year after this Constitution shall have



taken effect, at the general election, held for Governor, there shall be a poll opened in which the qualified electors of the State shall express by vote, whether they are in favor of calling a Convention or not; and if there should be a majority of all the votes given at such election, the Governor shall inform the next General Assembly thereof, whose duty it shall be to provide by law for the election of the members to the Convention, the number thereof, and the time and place of their meeting; and which Convention, when met, shall have it in their power to revise, amend or change the Constitution." (Convention Journal, p. 830.)

The first section as reported by the committee was then rejected by the convention. (Convention Journal, p. 831.)

The second section being taken up for consideration, Mr. Stevenson of Patnam County, moved to amend by making a majority vote instead of two-thirds of the members elected in each of the two houses sufficient to pass a proposed amendment. And Mr. Owen of Posey County moved to amend this by striking out the section and inserting instead the following:

"Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes taken thereon and referred to the Legislature to be chosen at the next general election, and if in the Legislature so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each House, then it shall be the duty of the Legislature to submit such amendment or amendments to the qualified electors of the State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this Constitution."

Mr. Newman, a member from Wayne County, moved to amend the amendment offered by Mr. Owen, by striking it out and inserting therefor the following:

"The General Assembly may at its first session after six years from the adoption of this Constitution, and every tenth year thereafter, by a vote of three-fifths of each branch thereof recommend to the electors of this State, any alteration or amendment to this Constitution, and provide for submitting any such alteration or amendment to a vote of such electors, and if a majority of such electors shall vote in favor of such alteration or amendment then the same shall be adopted and form a part of this Constitution."

Mr. Newman's amendment failed and that of Mr. Owen was adopted and engrossed for third reading. (Convention Journal, pp. 831, 832, 833; Debates of the Convention, 1915, 1918.)

The second section being taken up on third reading, Mr. Pettitt, a member from Tippecanoe County, moved to recommit it with instructions to strike it out and insert instead the following:

"No amendment shall be made to this Constitution, unless the same shall be called for, and approved by a majority of all the voters of this State."

Mr. Howe of La Grange County moved to amend this proposal by adding to it the following:

"And once in every twelve years after the adoption of this Constitution, the General Assembly may pass an act for the call of a Convention, and if the next General Assembly shall, by a majority vote, adopt the said act, it shall then provide by law for the opening of a poll, in which the qualified electors of the State shall express by vote, whether they are in favor of calling a Convention or not, and if a majority of all the votes given at such election be in favor of calling a Convention, then such Convention shall be called, which Convention shall have the power to revise, amend or change the Constitution; but no amendment shall be proposed or made, nor shall a Convention be called, otherwise than as in this article expressly provided."

Both propositions failed and the section was not recommitted but passed and referred to the committee on revision, arrangement and phraseology by a vote of 77 to 45. (Convention Journal, pp. 837, 838, 839.)

Later, an additional section proposed by Mr. Ritchey of Johnson County, the chairman of the committee, was adopted, and it reads as follows:

"If two or more amendments be submitted at the same time they shall be submitted in such manner that the people shall vote for or against each of such amendments separately; and while an amendment or amendments which has been agreed upon by one General Assembly, is waiting the action of a succeeding General Assembly, or undergoing the final consideration of the people, no additional amendment or amendments shall be proposed."

151 And the following offered as an additional section by Mr. Helmer of Lawrence County was rejected:

"Every tenth year after the adoption of this Constitution, at the general election held therein, there shall be a poll opened in which the qualified electors of the State shall express by vote whether they are in favor of calling a Convention or not; and if there should be a majority of all the votes given at such election in favor of a Convention, the Governor shall inform the next General Assembly thereof, whose duty it shall be to provide by law for the election of the delegates to the Convention, the number thereof, which shall not exceed one from every Senatorial district into which the State is at the time divided and the time and place of their meeting, which Convention, when met, shall have power to revise, amend, or change the Constitution." (Convention Journal p. 841, 842).

The committee on revision, arrangement and phraseology reported back to the convention the provisions for amendment and change of the constitution proposed by Mr. Owen and Mr. Ritchey with slight changes in the phraseology, and they became respectively sections 1 and 2 of article 16 of the Constitution as it now is. (Convention Journal, p. 976).

The debate in the convention, during the consideration of these various methods of providing for change or amendment of the constitution in the future, is illuminating, and makes clear the

purpose of that body which by express representative authority was exercising the sovereignty of the people in amending and revising their fundamental law. Mr. Ritchey, the chairman of the committee, defended its report recommending the two sections. He favored the two methods of making amendments, that, provided by the first section, for calling a convention when general and numerous amendments were contemplated, and the one, provided by the second section, when isolated amendments were deemed desirable. The latter method was to save the greater expense and inconvenience of a convention. He defended the requirement of a vote of two-thirds of the members of the two houses of the legislature on the ground that it was "a necessary check upon the too frequent introduction of propositions to change the provisions of the Constitution." "If there is anything that should be held sacred," he said, "and scrupulously guarded against hasty and inconsiderate changes, it is the fundamental law." "He expressed regret that the convention had rejected the provision embodied in the first section for amending by convention and said, "I would prefer, myself, that the people should have the power to call another convention to amend the Constitution."

152 *Constitution."*

In advocating the adoption of his proposal above set forth Mr. Newman expressed his opposition to the frequent changes in the organic law made possible by the proposed section 2 of Mr. Owen's proposed amendment of it. He thought that to permit the legislature by a three fifths vote to propose amendments at intervals of ten years only would insure that a healthy and matured public sentiment on the subject would prevent inconsiderate proposals for amendment.

Mr. Owen in answer agreed that it was desirable that there should not be too great instability in regard to the constitution; but he opposed the proposition to attempt to restrict amendments to periods of ten years, which made it too difficult to amend the organic law, and he also opposed the proposition of Mr. Pettit which infringed stability. He said among other things:

"But I say that if you insert such a provision as this, placing no greater check than that of requiring two successive Legislatures to act affirmatively upon the question before it shall be submitted to the people, I am convinced that it will be entirely satisfactory. It is very well known that I am not conservative in my opinions. I believe in progress and advancement in the science of government as well as all other sciences, physical and moral. But while I am willing that changes and amendments should from time to time be made, yet I would not have them made without due consideration. I would have at least the meeting of one Legislature intervening between the time of the first proposing of an amendment and the time of its final adoption. I believe if we adopt the section as it stands we will have a just medium between the proposition of the gentleman from Tippecanoe, which I hold does not interpose a sufficient check, and the proposition of the gentleman from La Grange which I think wholly impracticable."

Mr. Kelso of Ohio and Switzerland Counties, and Mr. Steele supported the amendment of Mr. Owen on the ground that it provided an easy and safe mode of change, or amendment.

Mr. Pettit advocated leaving the greatest freedom of action to the people in initiating and making changes in the Constitution.

Mr. Howe expressed himself in favor of amendment by convention alone, and then only at periods of twelve years when the people had voted in favor of such convention.

Mr. Rariden of Wayne opposed any provision permitting amendment or change oftener than at periods of five years and  
153 favored action by convention as being the most satisfactory.  
(Debates of the Convention, pp. 1913, to 1918, 1938, 1939).

It will be noted that the provision proposed by Mr. Read was, with the exception of the last part of it, which limited the right of the legislature to propose amendments to periods of ten years, similar to the one which subsequently met the approval of the convention, and became a part of the constitution. And in the discussion of it earlier in the convention, it seemed to be agreed, that if the constitution of 1816 had contained a similar provision for amendment by legislative initiation, the convention then being held would have been wholly unnecessary. Mr. Owen agreed that there should be provision for amendments to be proposed by the legislature, and that such proposed amendments should be approved by two successive legislatures, but he opposed that part limiting action to ten year periods. Mr. Borden of Allen County expressed his disapproval of this or any proposition to confer upon the legislature any power to frame and submit amendments and favored, in the interest of stability, amendment by convention alone, to be called only at long intervals, and after a vote of the people favorable to the calling of a convention had been taken. (Debates of Conv. pp. 1258, 1260).

What the words of the constitution of 1851 meant at the time it was framed by the representatives of the people, taking counsel together in convention for the good of the state, and speaking with their voice, it must mean now to the people, and to all the departments of their government in the hands of their agents. For, as said by the Supreme Court of Michigan speaking through Cooley, J.: "Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, \* \* \* to a construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. *Bay City v. State Treasurer*, 23 Mich. 499, 506.

There can be little doubt but that the framers of the revised constitution of 1851 believed that in article 16 they had provided an

orderly method for making all the changes in the organic law which might become necessary. If they were conscious of the accomplishment of a good work they were justified. All of the best principles of a representative democracy were declared and guaranteed. Governmental power was divided, and placed in separate agencies and other checks against the growth of power into absolutism were provided. That progress and growth might require change in some minor respects was recognized, and such change provided for in article 16. It is manifest that they held the views relating to future changes in the organic law which influenced the Convention of Massachusetts of 1820 of which Daniel Webster was a member and chairman of the committee on future amendments which reported in favor of the legislative mode of proposing amendments under guards and restrictions, and inserted no provision for calling a convention. In explaining the reason for the action Mr. Webster said:

"It occurred to the committee that, with the experience which we had had of the Constitution, there was little probability that, after the amendments which should now be adopted, there would ever be any occasion for great changes. No revision of its general principles would be necessary, and the alterations which should be called for by a change of circumstances would be limited and specific. It was, therefore, the opinion of the committee that no provision for a revision of the whole Constitution was expedient, and the only question was in what manner it should be provided that particular amendments might be obtained. It was a natural course, and conformable to analogy and precedent in some degree, that every proposition for amendment should originate in the legislature, under certain guards and be sent out to the people. (*Debs. Mass. Conv. 1820*, pp. 413, 414)."

Another thing is clearly disclosed by the review given of the proceedings of the convention on this subject, and that is, that it was the judgment of that body that an easy, and wholly adequate method of making needed changes in the constitution had been provided. Evidently, individual members thought it too easy.

In years, it came about that there was the pressing need and demand for changes in the constitution, which progress and growth bring, in some particulars relating to the time of holding elections, the qualifications of voters, courts, the indebtedness of cities, fees and salaries of public officers, and other matters. The legislature of 1877 under the power conferred by article 16 framed seven different amendments, and referred the same to the next general assembly, which performed its function in accordance with the constitutional authorization, and submitted them to the people for adoption. (*Acts 1879*, p. 25). They received a majority of the votes cast to them, but not a majority of all the votes cast at the election. A question arose over their adoption and the case

of *Swift v. State*, 69 Ind. 505, presented that question to this court for determination. It was held, that not having received a majority of all the votes cast at the election in which they were voted on, they had failed of adoption. It is a part of the

history of the State that the matter of the failure of the ratification of the proposed amendments was widely and well considered and discussed during the period preceding the ensuing general election, so that the public mind was involved in a study and consideration of fundamental legislation. Subsequently, the general assembly of 1881 again provided for submission of these amendments at a special election and they were ratified, and became a part of the organic law of the state.

Again in 1903, the legislature, acting under the provisions of article 16, initiated a proposed amendment to vest in the legislature authority to fix the qualifications for admission to the bar, and the general assembly at the ensuing session in 1905 approved the action, and provided for the submission of the proposed amendment at the general election in 1906. It received a majority of the votes cast on it, but not a majority of the votes cast at the election, and failed of adoption. The general assembly of 1907 again placed it before the voters at the general election in 1908 and again it failed by reason of not receiving a majority of all the votes cast at the election. Once again the general assembly at its session in 1909 referred this amendment to the will of the voters at the general election in 1910, and once more it received a majority of the votes cast thereon, but not a majority of the votes cast at the election. And so it stands obstructive of further proposals for amendment, by reason of the provision of section 2 of article 16, while waiting definitive action by the people. During all the time that has witnessed difficulties in securing consummation of amendments to the constitution in the mode allowed and provided by that instrument, no suggestion has come from any citizen, skilled in the science of government or not, that the general assembly possessed the power, under the general grant of legislative authority, to frame amendments into the existing constitution and submit them as a new constitution as now proposed. Nor has the claim ever been advanced that the legislature had power to draft and submit proposed organic law other than that specifically given by article 16.

The contemporaneous construction, which has persisted for nearly a century, speaks loudly in harmony with reason and the sound principles of representative democracy against the possession of the power claimed. The assertion of the power by the general assembly of 1911 was not born of any grant to the legislative department either expressly, generally, or by any implication which is  
 156 permissible. But by taking cognizance of the history of the time, we know the amendments, which have been proposed in the orderly way by the general assembly under constitutional direction, have failed of adoption, not through any defect in the mode provided by the constitution for making the amendment, but through an indifference, or lack of interest on the part of the people themselves in the proposed change, or through a failure of the legislature to place them before the people for ratification at a special election where their interest would not be alienated by the other interests involved in a general election. And we are asked to raise the power from the general legislative authority by implication, to serve

convenience and expedition in making organic change. If it were conceded that an easier and quicker mode of change is desirable, a concession not permissible, if the views of the greatest writers on questions touching government under written constitutions are of force, a canon of constitutional construction forbids the implication of the authority, for it is the rule that where the means by which the power granted shall be exercised are specified, no other, or different means for the exercise of such power can be implied, even though considered more convenient or effective than the means given in the constitution; and the constitution gives special power to the legislature, and provides the means of exercising it, to effect needed changes in the organic law. Should the general assembly ignore the provisions of the constitution in relation to drafting and submitting amendments, and at one session frame one or twenty proposed amendments, and provide for the submission at the next following general election, it would be clear, beyond all contention, that they would be acting without power, and the act providing for the submission a mere nullity. How can it be possible then that they can at one session incorporate the changes, twenty-three in number, in a copy of the existing constitution, designate their work a "proposed new constitution", and incorporate it in a bill, sending it to the people at the next ensuing general election for their adoption or rejection as it is sought to do by Chapter 118? The power cannot inhere in them to do the latter if not the former.

To grant the contention of appellant's learned counsel would be to concede that a general assembly was clothed with power to draft an amendment, or a new constitution, and, in the first days of their session, pass an act submitting it to the people at a special election in thirty days, or ten days; and if it received the approval of a majority of those voting at the election, though a small minority of the voters of the state, ordain it as organic law before the end of the session. This possibility illustrates badly,

at once, the unsoundness of the contention, and the wisdom of the framers of the constitution in guarding changes of that instrument. The great men who builded the structure of our state in this respect, had the mental vision of a good constitution voiced by Judge Cooley who has said: "A good constitution should be beyond the reach of temporary excitement and popular caprice or passion. It is needed for stability and steadiness; it must yield to the thought of the people; not to the whim of the people, or the thought evolved in excitement or hot blood, but the sober second thought, which alone, if the government is to be safe, can be allowed efficiency." \* \* \* Changes in Government are to be feared unless the benefit is certain. As Montaigne says: "All great mutations shake and disorder a state. Good does not necessarily succeed evil; another evil may succeed and a worse." Am. Law Rev. 1889, p. 311.

It was the thought of the people, the sober second thought, that the framers of our constitution invoked by the provision which they inserted for amendment and change; and for this, in the people and their representatives as well, they provided for the delay embodied in article 16 for that discussion and consideration which would

bring it forth. They knew the truth expressed by Professor Lieber that an election, which takes place to decide on the adoption or rejection of a fundamental law, can have no permanent value whatever unless the question has been fairly before the people for a period sufficiently long to discuss the matter thoroughly, and under circumstances to allow a free discussion. *Civil Liberty and Self-Government*, p. 414.

The question is one of power to draft organic law. Of such power the legislature has only that measure expressly granted to it by the people speaking through the constitution; and that is to be exercised strictly in the mode provided.

The proposed "new constitution", incorporated in Chapter 118 for submission, carries in its terms a confession, if not a lack of power in the general assembly to formulate and submit it, surely of the unwisdom of the practice, for in that part of its provisions devoted to the future changes the following is found: "No new constitution shall be submitted to the electors of this state for ratification and adoption or rejection, until by virtue of an act of the general assembly, a majority of the legal voters of the state have declared in favor of a constitutional convention; when and whereupon, such constitutional convention shall be convened in such manner as the general assembly may provide, but any constitution by such convention proposed shall be submitted to the voters of this state for ratification or rejection at a special election as may be ordered by the general assembly."

The learned counsel for appellants contend that no restrictions upon the making of a new constitution are imposed by the present constitution, and it is insisted that the action of the legislature in the submission to the people in 1846, 1847 and 1849, at times not specifically authorized by the constitution of 1846, of the question whether they desired a convention called to revise or amend the existing constitution, furnished a clear precedent for the action of the general assembly of 1911.

To neither contention does our judgment compel, or permit assent. As to the first, we have seen the general grant of legislative authority does not include the formulation of organic law; and we look for no restrictions in that grant, upon the matter of constitution-making, for that is a power inhering in the people as declared, as we have seen, in the first article of the constitution. "Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done." *Cooley's Const. Lim.* p. 243. And again we find in the same work on page 245 the following: "and however proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is found upon examination not to be broad enough to cover the obnoxious authority. The absence of such prohibition cannot, by implication, confer power."



To the second contention it may be answered that the general assembly in the action taken in those years, made no attempt to assume the power under the general grant of authority to legislate, to formulate a new constitution, or revise the existing one. It merely asked the people to express their will in relation to calling a convention to revise or amend the constitution, to be expressed through the ballot, and when it was expressed, it was a warrant and a command, which the legislative agency carried out as given. Under such circumstances, the calling of a convention, as Jameson in his work shows, is in accordance with sound political principles and a well-recognized and established practice. And the rule thus established in American constitutional law by the evolution of the constitutional convention from the two revolutionary conventions of England in 1686 and 1689, he shows is applicable to states like ours, having a limited provision for amendment, through the initiative of the legislature, but no provision for a convention for a general revision. But we know of no authority, and counsel have exhibited none to us, to the effect that when the government of a state has been instituted under a written constitution delegating powers to agents, with limitations and checks thereon, the legislature takes plenary power at will, under its general grant of legislative authority, to prepare and submit to the people proposed organic law. The formation of constitutions in the revolutionary and reconstruction periods of our history, and instances such as that involved in the case of *Brittle v. People*, 2 Neb. 198, which involved the validity of a constitution submitted to the people by the territorial legislature, and by which the state government was instituted, are obviously distinguishable. There existed in Nebraska at the time of the decision of that case, no state constitution to designate the legislative authority, or limit its exercise. By the institution of government under a written constitution the people have bound not alone their agents, but themselves as well, until that instrument is changed by orderly method; and of these the two exist,—the convention; where extensive amendment or revision is desired, and the specifically granted legislative mode; when few and comparatively simple amendments are deemed desirable. As said by the Supreme Court of Pennsylvania in *Wood's Appeal*, 75 Pa. St. 59:

"No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a new government. Governments thus accepted and ratified by silent submission afford no precedents for the power of a convention in a time of profound tranquillity, and for a people living under self-established, safe institutions."

It would not be practicable, if possible, in a written constitution, to specify in detail all of its objects, and purposes, or the means by which they are to be carried into effect. Such prolixity in a code designed as a frame of government, has never been considered necessary or desirable; therefore constitutional powers are often granted or restrained in general terms, from which implied powers and restraints may necessarily arise. It is an established rule of construction, that where a constitution confers a power, or enjoins a duty, it

also confers, by implication, all powers that are necessary for the exercise of the one, or for the performance of the other. But this rule cannot serve to admit, by implication, within the scope of ordinary legislative authority, the extraordinary power to participate in constitution-making, by framing and submitting a new constitution. Moreover, this rule of construction is coupled with another equally well established, the one above referred to, that where the means by which a power granted shall be exercised are specified, no other or different means for the exercise of the power can be implied, even though considered more convenient, or defective, than the means given in the constitution. (8 Cyc. 742). The thing attempted to be done by the general assembly is merely to prepare and propose changes in the organic law, and submit their work to the people, in a quicker and easier way than that provided by the express provision, and the fact that it takes the form of a complete constitution, can not prevent the application of the rule.

We think it has been made to appear, indeed, that by the very strongest implication, the power claimed is denied the legislature, and not given to it. We have seen that the intent of the framers, and the spirit which entered into article 16 when it was prepared and agreed to by the representatives of the people in the business of constitution-making in the convention of 1850, were directly against such action as that taken by the general assembly, and in such case the words of the highest court of New York are applicable:

"A written constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of the government and individual citizens, according to its spirit and the intent of its framers as indicated by its terms." *People v. Albertson*, 55 N. Y. 50, 55.

"We must not forget that a constitution is the measure of the rights delegated by the people to their governmental agents and not of the rights of the people. \* \* \* The implied restraints of the constitution upon legislative power may be as effectual for its condemnation as is the written word, and such restraints may be found either in the language employed, or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law." *Rathbone v. Wirth*, 150 N. Y. 459, 470, 483; 34 L. R. A. 408.

If the power to draft and submit to the people organic law is embraced in the broad bestowal of "the legislative authority of the state," made in section 1 of article 4, where is the limitation on it, save that of the constitution of the United States? What check is laid upon the use of the power? There is none, for all the checks and limitations which the people in their constitution have placed upon the legislature, are upon the exercise of the power over ordinary legislation, and have no relation to fundamental legislation. The legislature being supreme, and sovereign in the exercise of the legislative authority, save only as it is limited by the constitution of the United States, the laws and treaties made under it, and the limitations stated in our state constitution, if its

general authority includes the subject matter of organic legislation, why submit the "new constitution" to the people at all? For the federal constitution or laws do not prohibit doing so, and no limitation is found in article I of our own constitution which places a ban upon the action.

It must be remembered that the constitution is the people's enactment. No proposed change can become effective unless they will it so through the compelling force of need of it and desire for it. We have not heard the voice of the people raised in a demand for a new constitution. And so we doubt if there is reason for applying the doctrine of construction *ab inconvenienti* to the existing constitution to hurry to the people organic change which they had not called for. That the constitution may need amendment may be true. But there has never been a time when the people might not, if they pleased and if they had believed it necessary, have made any change desired in the orderly ways provided. That they have not done so, and that the general assembly may believe good will follow by deviating from slow and orderly processes, will not justify a construction of the constitution which does violence to its intent and express provisions.

In Cooley's Const. Lim. 7th Ed., p. 107, note, it is said:

"We agree with the Supreme Court of Indiana, that, in construing constitutions, courts have nothing to do with the argument *ab inconvenienti*, and should not bend the Constitution to suit the law of the hour." *Greencastle Township v. Black*, 5 Ind. 557, 565; and with *Brimson*, Ch. J., in what he says in *Oakley v. Aspinwall*, 3 N. Y. 547, 568: "It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing as I do that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always  
162 some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens

the door for another which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

The sound rule which, as we have seen, is approved by Mr. Jameson, and which must be applied to the determination of the question is well stated in 6 American and English Encyclopedia of Law, 2d Ed. p. 902, as follows:

"The proposal of amendments to the constitution is not a power inherent in the legislative department, but must be conferred by a special grant of the constitution, and in the absence of such a provision, the legislature has no capacity thus to initiate amendments. On the other hand, long-established usage has settled the principle that a general grant of the legislative power carries with it the authority to call conventions for the amendment, or revision of the constitution; and even where the only method provided in the constitution for its own modification is by legislative submission of amendments, the better doctrine seems to be that such provision, unless in terms restrictive, is permissive only, and does not preclude the calling of a constitutional convention under the implied powers of the legislative department."

It is the contention of appellants' counsel that the present constitution provides how amendments *may* be made, but does not prescribe how they *shall* be made; and that, therefore, if Chapter 118 shall be considered as an attempt to propose amendments to the organic law, the provisions of article 16 are not violated. As we have seen, no pretense was made of complying with the provisions of section 1 of the article, requiring amendments to be passed upon by two general assemblies, and entering the proposed change upon the journals, together with the yeas and nays; moreover, the amendment relating to qualifications for admission 163 to the bar, is still awaiting the action of the electors, and section 2 of the article provides in such case "no additional amendment or amendments shall be proposed" by the legislative mode. The rules of constitutional interpretation above referred to apply with compelling force to overthrow this contention. And judicial and commentatorial utterance on the precise question is overwhelmingly against the contention. In Jameson on Constitutional Conventions the rule is stated on page 615 as follows:

"In a previous section it was said, that the power given to a legislature to propose to the people amendments to the Constitution is not an incident to the general grant of legislative power, but if it exist at all, rests upon some special constitutional provision; in other words, that it is a statutory power. From this it follows that, like all statutory powers, it must be strictly pursued. So far there has been little or no controversy."

The rule is sustained by *State v. Swift*, 69 Ind. 505, in which this court declared on page 519 in the opinion of the court by Biddle, C. J., who was a member of the Constitutional Convention of 1850-51:

"The people of a State may form an original constitution, or

abrogate an old one and form a new one, at any time, without any political restriction except the constitution of the United States; but if they undertake to add an amendment, by the authority of legislation, to a constitution already in existence, they can do it only by the method pointed out by the constitution to which the amendment is to be added. The power to amend a constitution by legislative action does not confer the power to break it, any more than it confers the power to legislate on any other subject, contrary to its prohibitions."

And again, in the opinion of this court in the case entitled, *In re Denny*, 156 Ind. 104, it was said by Baker, J., who spoke for the court: "It is only by virtue of the constitution's command to that body that the proposed amendment may be submitted by legislative act." *State v. McBride*, 4 Mo. 303; 29 Am. Dec. 636; *Collier v. Frierson*, 24 Ala. 100; *Kochler v. Hill*, 60 Iowa, 542; *State ex rel. v. Tully*, 19 Nev. 391; 3 Am. St. Rep. 895; *State ex rel. v. Timme*, 54 Wis. 318; *Opinion of Judges*, 6 Cush. 573; *Kadderly v. Portland* 44 Cal. 118; *McBee v. Brady*, Governor, 15 Idaho 761; *Trustees of University v. Melver*, 72 N. C. 76; 6 Am. & Eng. Encyc. of Law, pp. 902, 903, 904; 8 Cyc. 719; See also many of the cases cited hereinafter in this opinion in considering the question of jurisdiction.

One of the latest expressions of the rule by the courts of the country relating to amendment and change of constitutions by the legislative mode is the following from *McBee v. Brady*, Gov. *supra*:

"The constitution is the fundamental law of the state. It received its force from the express will of the people, and in expressing that will the people have incorporated therein the method and manner by which the same can be amended and changed, and when the electors of the state have incorporated into the fundamental law the particular manner in which the same may be altered or changed, then any course which disregards that express will is a direct violation of that fundamental law."

A law that is unconstitutional, is so because it is either an assumption of power not legislative in its nature, or, because it is inconsistent with some provision of the federal or state constitution. *Commonwealth v. Maxwell*, 27 Pa. St. 444.

Sound legal and political principles, the history of our political life as a state and the authority of judicial and commentatorial opinion, all unite in forcing the conclusion that the act of 1911 is invalid for want of power in that body to draft an entire constitution and forthwith submit it to the people under its general legislative authority, if the instrument be conceded to be a new constitution and not merely amendments; and that if it be considered as merely a series of amendments, it is a palpable evasion and disregard of the requirements and checks of article 16, and is for that reason void. This conclusion renders unnecessary any consideration of the other objections raised against the validity of the act.

But counsel for appellants, with great earnestness and signal

ability both in argument and briefs insist that this court is without jurisdiction to determine this question.

Since the lucid exposition of the power of courts to declare an act of legislation void when in excess of the power of the legislature or in conflict with some express provision of the constitution, which was given by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, the existence of the power in the courts has never been denied. Nor, since that decision, has the wisdom of so placing the power, until of late, been questioned as a necessary political principle in governments under written constitutions. The power had been exercised in prior cases but had not before been authoritatively declared to exist. Thayer's *Cases on Constitutional Law*, Vol. 1, pp. 48, 107. Marshall's *Complete Constitutional Decisions Annotated*, p. 39.

165 In a Marshall Commemorative address delivered before the state bar association in 1901, Marshall Memorial, Vol. 1, p. 345, 361, John F. Dillon, the distinguished jurist and author, said of it: "The case also decided for the first time in the Supreme Court of the United States that an act of Congress repugnant to the constitution is void—observe, not voidable, but *void*—and that it is not only within the power, but it is also the duty, of the judicial department so to decide in any case properly before it involving the question. It is this point affirming the power and duty of the court to adjudge the laws in conflict with the constitution to be void that gives to that opinion, which has become the corner-stone of the constitutional law of this country, its vital and transcendent importance."

Professor Parsons in commenting on the case said in an address, found in *Am. Law Review*, 1865, p. 432; Marshall's *Com. Const.*, Dec. p. 37, said:

"I should not do justice to my own deliberate belief did I not say that I think this decision is not surpassed in the ability it displays, nor equalled in its utility, by any case in the multitudinous records of English or American jurisprudence."

Chancellor Kent's approval of the decision is as follows:

"This great question may be regarded as now finally settled, and I consider it to be one of the most interesting points in favor of constitutional liberty and of the security of property in this country that has ever been judicially determined. In *Marbury against Madison* this subject was brought under the consideration of the Supreme Court of the United States and received a clear and elaborate discussion. The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any State Legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration." 1 Kent's *Comm.* pp. 453, 454.

And the following are the words of that great American lawyer, Rufus Choate:

"I do not know, that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the legislature contrary to the Constitution is void, and

that the judicial department is clothed with the power to ascertain the repugnance and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the Executive, to have vindicated it by that easy yet adamant demonstration than which the reasonings of mathematics show nothing surer, to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue not in the last stages of intoxication denies it,—this is an achievement of statesmanship (of the judiciary) of which a thousand years may not exhaust or reveal all the good." Marshall's *Com. Const.*, Dec. p. 38; *Marshall Memorial*, Vol. 1, 363.

In discussing this power of the courts, in exercising the judicial function of government, to declare legislative enactments void when that body has, in such enactment, gone beyond or outside of the power granted to it, Professor Leiber uses the following language in his work on *Civil Liberty and Self Government* at page 162:

"The supremacy of the law requires that where enacted constitutions form the fundamental law there be some authority which can pronounce whether the legislature itself has or has not transgressed it in the passing of some law, or whether a specific law conflicts with the superior law, the constitution. If a separate body of men were established to pronounce upon the constitutionality of a law, nothing would be gained. It would be as much the creature of the constitution as the legislature, and might err as much as the latter. Quis custodiet custodes? Tribunes or ephori? They are as apt to transgress their powers as other mortals. But there exists a body of men in all well-organized politics, who, in the regular course of business assigned to them, must decide upon clashing interests and do so exclusively by the force of reason, according to law, without the power of armies, the weight of patronage or imposing pomp, and who, moreover, do not decide upon principles in the abstract, but upon practical cases which involve them—the middle men between the pure philosophers and the pure men of government. These are the judges—courts of law. When laws conflict in actual cases, they must decide which is the superior law and which must yield; and as we have seen that according to our principles every officer remains answerable for that he officially does, a citizen, believing that the law he enforces is incompatible with the superior law, the constitution, simply sues the officer before the proper court as having unlawfully aggrieved him in the particular case. The Court, bound to do justice to everyone, is bound also to decide this case as a simple case of conflicting laws. The court does not decide directly upon the doing of the legislature. It simply decides, for the case in hand, whether there actually are conflicting laws, and, if so, which is the higher law that demands obedience when both may not be obeyed at the same time. As, however, this decision becomes the leading decision for all future cases of the same import, until, indeed, proper and legitimate authority shall reverse it, the question of constitutionality is virtually decided, and it is decided in a natural, easy, legitimate, and safe manner, according, to the principle of the supremacy of the law and the independence of justice.

It is one of the most interesting and important evolutions of the government of law, and one of the greatest protections of the citizen. It may well be called a very jewel of Anglican liberty, one of the best fruits of our political civilization."

And Judge Cooley in his *Constitutional Limitations* thus treats the same question:

"So also there are cases where<sup>m</sup> after the two houses of the legislature have passed upon the question, their decision is in a certain sense subject to review by the governor. If a bill is introduced the constitutionality of which is disputed, the passage of the bill by the two houses must be regarded as the expression of their judgment that, if approved, it will be a valid law. But if the constitution confers upon the governor a veto power, the same question of constitutional authority will be brought by the bill before him, since it is manifestly his duty to withhold approval from any bill which, in his opinion, the legislature ought not for any reason to pass. And what reason so forcible as that the constitution confers upon them no authority to enact it? In all these and the like cases, each department must act upon its own judgment, and cannot be required to do that which it regards as a violation of the constitution, on the ground solely that another department which, in the course of the discharge of its own duty, was called upon first to act, has reached the conclusion that it will not be violated by the proposed action.

"But setting aside now those cases to which we have referred, where from the nature of things, and perhaps from explicit terms of the constitution, the judgment of the department or officer acting must be final, we shall find the general rule to be, that whenever action is taken which may become the subject of a suit or proceeding in court, any question of constitutional power or right that was involved in such action will be open for consideration in such suit or proceeding, and that as the courts must finally settle the particular controversy, so also will they finally determine the question of constitutional law.

"For the constitution of the State is higher in authority than any law, direction, or order made by any body or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. On any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity. But no mode has yet been devised by which these questions of conflict are to be discussed and settled as abstract questions, and their determination is necessary or practical only when public or private rights would be effected thereby. They then become the subject of legal controversies; and legal controversies must be settled by the courts. The courts have thus devolved upon them the duty to pass upon the constitutional validity, sometimes of legislative, and sometimes of executive acts. And as judicial tribunals have authority, not only to judge, but also to enforce their judgments, the result of a decision against the constitutionality of a legislative or executive act will be



to render it invalid through the enforcement of the paramount law in the controversy which has raised the question.

"The same conclusion is reached by stating in consecutive order a few familiar maxims of the law. The administration of public justice is referred to the courts. To perform this duty, the first requisite is to ascertain the facts, and the next to determine the law applicable to such facts. The constitution is the fundamental law of the State, in opposition to which any other law, or any direction or order, must be inoperative and void. If, therefore, such other law, direction, or order seems to be applicable to the facts, but on comparison with the fundamental law the latter is found to be in conflict with it, the court, in declaring what the law of the case is, must necessarily determine its validity, and thereby in effect annul it. The right and the power of the courts to do this are so plain, and the duty is so generally—we may almost say universally—conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject."

The power to determine and declare the law covers the whole body of the law, fundamental and ordinary, the latter being those laws which apply to particulars and are tentative, occasional and in the nature of temporary expedients. Whether legislative action is void for want of power in that body, or because the constitutional forms or conditions have not been followed or have been violated may become a judicial question, and upon the courts the inevitable duty to determine it falls. And so, the power resides in the courts, and they have, with practical uniformity exercised the authority to determine the validity of proposal, submission, or ratification of change in the organic law. Such is the rule in this State. *State v.*

*Swift* 69 Ind. 595; *In Re Denny*, 156 Ind. 104; See also *State v. Wurts*, 63 N. J. L. 289; 45 L. R. A. 251; *State v. Dahl*, 6 N. D. 81; 34 L. R. A. 97; *Warfield v. Vandiver*, 101 Md. 78; *Green v. State*, 5 Idaho 130; 95 Am. St. Rep. 169; *Hays v. Hays* 5 Idaho, 154; *State v. McBride*, 4 Mo. 393; 29 Am. Dec. 636; *Edwards v. Lesener*, 13 Mo. 410; 31 L. R. A. 816; *Russell v. Croy*, 164 Mo. 69; *Gabbert v. Chicago*, 171 Mo. 84; *State v. Foraker*, 46 Ohio St. 677; 6 L. R. A. 422; *State v. Winnett*, 78 Neb. 379; 10 L. R. A. (N. S.) 149; *Tecumseh v. Sanders*, 51 Neb. 801; *Green v. Willer*, 32 Miss. 650; *State v. Powell*, 77 Miss. 543; *State v. Timme*, 54 Wis. 318; *Koehler v. Hill*, 60 Iowa, 543; *State v. Brookhart*, 113 Iowa 250; *Labagh v. Cook*, 127 Iowa 181; *Collier v. Frierson*, 24 Ala. 100; *State v. Tooker*, 15 Mont. 426; *Durfee v. Harper*, 22 Mont. 354; *Oakland v. Hilton*, 69 Cal. 479; *Livermore v. Waite*, 102 Cal. 113; 25 L. R. A. 312; *West v. State* 50 Fla. 154; *State v. Tully*, 19 Nev. 391; 3 Am. St. Rep. 895; *State v. Dean*, 84 Neb. 344; *Westinghausen v. People*, 44 Mich. 265; *Carton v. Secretary of State* 151 Mich. 337; *Murphy v. Attorney General*, 148 Mich. 563; *Lovett v. Ferguson* 10 S. D. 44; *State v. Harried*, 10 S. D. 109; *Commonwealth v. Griest*, 196 Pa. St. 395; 50 L. R. A. 568; *Wells v. Bain*, 75 Pa. St. 39; 15 Am. Rep. 563; *Trustees of University v. Melver*, 72 N. C. 76; *Prohibitory Amendment Cases* 24 Kans. 700; *Kadlerly v. Portland*, 41 Or. 118; *Rice v. Palmer*, 78 Ark. 432; *Dayton v. City of St. Paul*, 22 Minn. 400; *State v. Young*, 29 Minn. 474;

Secomb v. Kittleson 29 Minn. 555; State v. Stearns 72 Minn. 200; McBee v. Brady, Governor, 15 Idaho 761; McCaughy v. Secretary of State, 106 Minn. 401.

In all of the cases just cited the courts assumed jurisdiction and determined questions relating to the initiation and adoption of proposed organic change. In many of them the power of the courts over the question was vigorously denied by counsel but in every instance it was held that the question was a judicial one and for the courts' determination when presented concretely by a case brought before them involving it. Nor is the general rule impaired or weakened by exceptions such as the case of *Worman v. Hagan*, 78 Md. 152, where it was held that as a special tribunal for determining whether amendments had been created by the constitution itself, which was therefore conclusive; or the case of *Miller v. Johnson*, 92 Ky. 589; 15 L. R. A. 525, where, after an irregularly formed and promulgated constitution had been recognized by the people, the executive and the legislative departments, and great interests had arisen under it, and important rights existed by virtue of it, the courts refused to pass upon questions raised as to its validity as the organic law of the state; or the celebrated case of *Luther v. Borden*, 7 How. 1, which involved the episode in the history of our country known as *Dorr's Rebellion*.

170 In the late and well considered case of *McCaughy v. Secretary of State*, *supra*, which was a proceeding to contest an election on proposed constitutional amendments, it was contended that the adoption of organic law was political action and beyond the jurisdiction of the courts. In the opinion of the court by Elliott, J. it was said: "An examination of the decisions shows that the courts have almost uniformly exercised the authority to determine the validity of the proposal, submission, or ratification of constitutional amendments." And after reviewing many of the cases; and stating the principles upon which written constitutions with us are based; and defining the discretionary or political powers given into the hands of the departments, it was said in affirming the power of the courts over the question stated:

"Thus the legislature may in its discretion determine whether it will pass a law or submit a proposed constitutional amendment to the people. The courts have no judicial control over such matters, not merely because they involve political questions, but because they are matters which the people have by the constitution delegated to the legislature. The Governor may exercise the powers delegated to him, free from judicial control, so long as he observes the laws and acts within the limits of the power conferred. His discretionary acts cannot be controllable, not primarily because they are of a political nature, but because the constitution and laws have placed the particular matter under his control. But every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the courts, as well as through the executive or the legislature. One department is just as representa-

tive as the other and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action. The recognition of this principle unknown except in Great Britain and America, is necessary, to "the end that the government may be one of laws and not of men"—words which Webster said were the greatest contained in any written constitutional document."

The jurisdiction of the courts was questioned on the same ground in the late case of *McBee v. Brady*, *supra*; which was a mandamus proceeding against the governor to compel him to call an election pursuant to amendments claimed to have been adopted, and the Supreme Court of Idaho said on pp. 775, 777:

171 "The constitution is the fundamental law of the state. It received its force from the express will of the people, and in expressing that will the people have incorporated therein the method and manner by which the same can be amended and changed, and when the electors of the state have incorporated into the fundamental law the particular manner in which the same may be altered or changed, then any course which disregards that express will is a direct violation of that fundamental law. These provisions having been incorporated in the constitution, where the validity of a constitutional amendment depends upon whether such provisions have been complied with, such question presents for consideration and determination a judicial question, and the courts of the state are the only tribunals vested with power under the constitution to determine such questions. \* \* \* Whether the constitutional method has been pursued is purely a judicial question, and no authority is vested in any officer, department of state, body politic, or tribunal, other than the courts, to consider and determine that matter."

In the well considered case of *Rice v. Palmer*, *supra*, after a consideration of the question, the court in its opinion concluded this on page 446:

"There can be little doubt that the consensus of judicial opinion is that it is the absolute duty of the judiciary to determine whether the constitution has been amended in the exact and precise manner required by the constitution, unless, perchance, a special tribunal has been erected to determine this question; and even then many of the authorities hold that this tribunal cannot be permitted to illegally amend the organic law. Therefore it is the duty of the court to decide the question on its merits."

In the opinion of the Supreme Court of Mississippi in the case of *State v. Powell*, *supra*, the question, after full consideration, was disposed of as follows:

"The true view is that the Constitution, the organic law of the land, is paramount and supreme over governor, legislature and courts. When it prescribes the exact method in which an amendment shall be submitted, and defines positively the majority necessary to its adoption, these are constitutional directness mandatory upon all departments of the government, and without strict compliance with which no amendment can be validly adopted. Whether an amendment has been validly submitted or validly adopted depends

upon the fact of compliance or non-compliance with the constitutional directions as to how such amendments shall be submitted and adopted, and whether such compliance has in fact been had  
 172 must, in the nature of the case, be a judicial question."

In the case of *State v. Wurtz*, supra, which was a proceeding by writ of certiorari at the instance of taxpayers to review the statement of the state board of canvassers of the result of an election on amendments, it was claimed that the concurrence of the board of state canvassers and the executive department of the government, in their respective official functions, placed the subject-matter beyond the cognizance of the judicial department of the government. The board of canvassers was composed of the governor and four or more members of the Senate whom it was provided, he should call to sit with him and canvass the vote and declare the result. And of this board it was said by the court speaking through Dixon, J.:

"It should be observed that neither the board of canvassers nor the governor was exercising a function devolved upon them by the Constitution. Each derived authority wholly from that statute. The powers conferred upon them might as well, if the legislature had so willed, have cast upon any other body."

And of its right to take jurisdiction it was said:

"In New Jersey the judicial authority was thus declared by Chief Justice Beasley, in *State v. Werts v. Rogers*, 56 N. J. L. 480, 616, 23 L. R. A. 354, and on this point he was delivering the opinion of every justice of the supreme court: 'when the inquiry is whether the legislature or any other body or officer has violated the regulations of the Constitution, it is entirely plain that the decision of that subject must rest exclusively with the judicial department of the government. \* \* \* For the exercise of that authority with regard to an attempted amendment of the Constitution, in conformity with the express provisions of that instrument, no occasion has heretofore arisen in this state; but we perceive no good reason for excluding such a case from the general principle. If a legislative enactment, which may be repealed in a year, or an executive act, which affects only a single individual, cannot be allowed to stand, if it contravenes the Constitution, a fortiori a change in the fundamental law, which is much more permanent, and affects the whole community, should not be permitted to take place, in violation of constitutional mandates.'"

The Supreme Court of Alabama in *Collier v. Frierson*, supra, made this declaration on the subject:

"We entertain no doubt that, to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the  
 173 omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. \* \* \* The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions en-

joined, if the legislature or any other department of the government can dispense with them? To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law."

In the case of *Hoehler v. Hill*, *supra*, Day, C. J., speaking for the court said:

"The authority opposed to the view advanced by appellant's counsel is most satisfactory and conclusive, and, so far as we have been able to discover, is without conflict. Not only must a constitution be amended in the manner prescribed in the existing constitution, but it is competent for the courts, when the amendment does not relate to their own powers or functions, to inquire whether, in the adoption of the amendment, the provisions of the existing constitution have been observed." And again: "While it is not competent for courts to inquire into the validity of the constitution and form of government under which they themselves exist, and from which they derive their powers, yet, when the existing constitution prescribes a method for its own amendment, an amendment thereto, to be valid, must be adopted in strict conformity to that method, and it is the duty of courts, in a proper case, when an amendment does not relate to their own powers or functions, to inquire whether, in the adoption of the amendment, the provisions of the existing constitution have been observed, and, if not, to declare the amendment invalid and of no effect."

It is said in 6 Am. & Eng. Ency. of Law, 2d Ed. p. 908:

"The courts have full power to declare that an amendment to the constitution has not been properly adopted, even though it has been so declared by the political departments of the state."

And to this conclusion the whole stream of authority harmoniously runs.

Counsel do not expressly deny the existence of this power in the courts of this state to declare the law, but, their position is  
174 that the provisions of our constitution which divide the governmental elements, the legislative, the executive and the judicial, and bestow them on three separate agencies, being accompanied by the declaration that, "no person charged with official duty under one of these departments shall exercise any of the functions of another except in this constitution expressly provided,"—the latter is a limitation of the judicial power when it is sought to coerce or restrain the performance of legislative or executive acts. And this, it is claimed, is sought to be done in this case and upon that ground the jurisdiction of the court is challenged.

This position of counsel, in so far as it relates to executive acts, grows out of the fact that section 16 of the general election law, being sec. 6897 Burns 1908, provides that "the governor of the state, and two qualified electors by him appointed, \* \* \* shall constitute a state board of election commissioners;" and the further fact that the act of 1911, known as Chapter 118, requires the performance by this board of certain purely ministerial duties relating to the sub-

mission of the so-called "new constitution;" and the further fact that this action is to enjoin the performance of these duties by the board. And the contention of counsel is, that the presence of the governor on this ministerial board is an absolute bar to the power of the judicial department to enjoin the board in the performance of the ministerial duties placed upon it by the act.

There is entire harmony in the decisions of courts and the writings of commentators in affirming the rule to be, that the acts of the governor of a state can in no case be controlled by the courts, directed or coerced by mandamus or restrained by injunction in duties strictly and exclusively political and executive and requiring, therefore, judgment and discretion. The principle that each department of the government is independent when acting within the sphere of its powers and answerable only to the people is thus made secure.

But there is an irreconcilable conflict of authority upon the question of the judicial control of the official acts of the governors of the various states, in regard to those duties imposed upon them by law, which are purely ministerial in their nature, and which do not necessarily pertain to the functions of the gubernatorial office, and which might have been imposed upon any other state officer. The cases are collected in an elaborate note to the case of *State ex rel. v. Brooks, Governor*, 14 Wy. 393, as reported in 6 L. R. A. (N. S.)

750. An examination of the reported cases holding that the  
175 courts cannot control the ministerial acts of the governor discloses that a number of them do not involve the question, but merely the attempt to control acts, in the doing of which the governor had a discretion. Such a case indeed is that of *People v. Governor*, 29 Mich. 320, an opinion of Cooley, J., much followed by later decisions, where it was said: "If we concede that cases may be pointed out in which it is manifest that the governor is left no discretion, the present is certainly not among them, for here, by the law, he is required to judge, on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer, or department."

And it would seem, that by an elimination of such cases the weight of authority both in number of decided cases and sound reason was favorable to the power of the courts. The decisions of this court have not positively and clearly settled the question. In *The Governor v. Nelson*, 6 Ind. 496, a mandamus was awarded against the governor to compel him to issue a commission to Nelson as clerk of the circuit court. The case of *Biddle v. Willard, Governor*, 10 Ind. 62, was an application for a mandamus to require the governor to issue a commission to Biddle as judge of this court and the writ was refused on the ground that at the time Biddle claimed to have been elected there was no vacancy in the office. In *Baker, Governor v. Kirk*, 33 Ind. 517, the circuit court awarded the writ to require the governor to issue a commission to Kirk as a director of the state prison, and this court sustained the action. It may be said that in neither of these cases was the power of the court over the governor in the matter of issuing commissions to officers raised or questioned.

The later case of *Gray, Governor v. State, ex rel.*, 72 Ind. 567,

involved the following facts: The general assembly had authorized the governor, attorney general, secretary of state and treasurer of state, or a majority of them, to redeem certain old outstanding improvement bonds. The action was for a writ of mandate to compel them to do so. In this court the question of the court's power to take jurisdiction was raised and disposed of by the opinion of the court written by Worden, J., in the following words:

"But the question whether a mandate will lie against the Governor to enforce the performance of an executive duty does not arise in this case. The duty of the Governor, in connection with the other officers named in the act, is not executive. The executive power of the State is vested solely in the Governor. Constitution, Art. 5, section 1.

173) "Any power or authority vested by legislation in the Governor, together with the other officers or persons, in which they are to have an equal voice with him, cannot be executive, as he alone is vested with the executive power of the State. Any duty which he is by law required to perform, in connection with others, in which they have an equal voice with him, can in no sense be said to be an executive duty.

"The Governor and the other officers named in the act may well be regarded as constituting a board, organized by the Legislature for the performance of certain duties; and a mandate will lie against them to enforce the performance of the duties prescribed. The duties to be performed under the act, save, perhaps, determining the genuineness of the bonds and coupons presented for redemption, were purely ministerial. A ministerial act is defined to be 'one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.' *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 174."

In the case of *Hovey, Governor v. State ex rel. Schuck*, 127 Ind. 588, the relator was awarded mandamus to compel the governor to issue to him a commission as Auditor of Jennings County. The governor appealed and denied the power of the courts to control his action in the matter. In the opinion of the court written by Coffey, J., the authorities were partly reviewed and the sharp conflict stated. *Gray v. State, ex rel.*, *supra*, was considered and it was said of it: "It is unnecessary that we should express our approval or disapproval of this case, as it must be apparent to every one, upon a moment's reflection, that the case before us is distinguished from this case and rests upon entirely different principles." And the conclusion was stated thus: "We think the Governor's decision in this matter must be taken as final. The case is not one where the Governor is acting as the member of a board created by legislative enactment, in a matter wholly disconnected with his functions as Governor of the state; but it is a case where he is required to act as Governor." It may be noted that section 6 of article 15 of the constitution provides that "all commissions shall issue in the name of the state, and be signed by the governor." Thus we see that the duty of the governor to issue commissions is a duty placed upon that officer by the constitu-

tion, and the general assembly may not place it elsewhere. On the other hand, the state board of election commissioners is purely a creature of the legislature; the personnel of its membership and the character of the duties placed upon it and manner of their exercise, are entirely under the control of that body. No provision of the constitution and no compelling reason bound the legislature to make the governor a member of the board. It might with equal right and perhaps with greater propriety have made the secretary of state and two qualified electors, or any other subordinate state officer, or three qualified electors to be appointed by the governor, rather than to place upon the chief magistrate the subalternate ministerial duty of supervising the preparation of and distributing the state ballots. Had this been done, and the board so constituted, then it could not be doubted that the board's acts would be subject to the supervisory jurisdiction of the courts, for there is no considerable authority, if any, for claiming immunity from judicial cognizance in the performance of a ministerial duty, for any officer other than the executive head of the state. The governor is one of the three members of the board. As such member he has identically, under the law, the same duties as each of the other two, with just such power and authority in the transaction of the duties directed as one of the others and no more. The two members may out-vote him, control the action of the board and proceed unlawfully; and that action may infringe the rights of citizens. Must it be said then, in such case, that the board is above the law and beyond the reach of the power of the courts to declare the law and protect rights? No principle of law or sound reason permits an answer in the affirmative. To say that the presence of the governor on a board as a member is a bar to the jurisdiction of the courts, while without him, the board, with identically the same duties, is subject to judicial cognizance, is to say that rights may be secure and enforceable in the latter case, and without remedy in the former. This is contrary to sound legal principles. Our statutes contain many instances of the association of the governor with administrative officers and citizens on boards for the performance of various governmental duties. A list of many of these, nearly twenty in number is given in *French v. State*, ex rel. 141 Ind. 618, at page 637.\*

The courts of this state took jurisdiction and determined on its merits a suit against one of these boards, the state board of education, to enjoin it and the individual members from letting a contract. *Silver, Burdett & Co. v. Indiana State Board, etc.*, 35 Ind. App. 438. The possible evil effects of holding these boards to be outside of the pale of the jurisdiction of the courts are so obvious that such a rule cannot be sanctioned.

In the great majority of cases in which a governor's immunity from judicial control has been considered and passed upon, the action was for mandamus to compel action and not injunction to restrain; and counsel for appellants contend that the remedies are not correlative, and, if conceded that mandamus would lie against the board, still it is claimed injunction will not. An unconstitutional law gives no power and imposes no duty. If the



board had refused to perform the duties in relation to the submission which the act of 1911 seeks to place upon it, on the belief that the act was invalid, mandamus would have been available to compel their action. The remedy of injunction, on the other hand, may be resorted to, in order to restrain them from acting. Eminent authority is against counsel's contention. In Pomeroy's Equity Jurisprudence, Vol. 5, p. 583, sec. 328, it is said:

"An injunction will not issue against an executive officer of the government, nor against one acting under him, to restrain the performance or execution of administrative acts and orders within the scope of his authority. This is based upon the principle which governs also the legal remedy of mandamus. It would be contrary to our theory of government for the judicial department to interfere with the reasonable discretion of the executive. Hence, courts of law and of equity refuse the remedies of mandamus and injunction when they will have the effect of controlling a reasonable discretion. Where no question of discretion is involved, both law and equity will interfere without hesitation. It is generally stated that mandamus may issue in a proper case to compel the performance of a ministerial act. The corresponding statement as to injunction is that it may issue in a proper case to restrain an act in excess of the officer's authority."

In *Noble v. Union River Logging Ry.*, 147 U. S. 172 it was said: "If he" (Secretary of State) "has no power at all to do the act complained of he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

In *Board of Liquidation v. McComb*, 92 U. S. 531, the court in discussing the power of courts to enjoin state officials, said:

"But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. *Osborn v. Bank of the United States*, 9 Wheat. 859; *Davis v. Gray*, 16 Wall. 220."

In *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 493, the supreme court of that state uses the following language:

"Inasmuch as the use of the writ of injunction in the exercise of the original jurisdiction of this court is correlative with the writ of mandamus, the former issuing to restrain where the latter compels action, it is plain that this case, as against the respondent, is a proper one for an injunction to restrain unauthorized action by him in a matter where his duties are clearly ministerial and affect the sover-

eighty, rights, and franchises of the State, and the liberties of the people."

And in *State ex rel. Lamb v. Cunningham*, 83 Wis. at page 127, the court quotes from Chief Justice Ryan in a former case:

"And it is very safe to assume that the constitution gives injunction to restrain excess in the same class of cases as it gives mandamus to supply defect; the use of the one writ or the other in each case turning solely on the accident of over-action or shortcoming of the defendant. And it may be that where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose."

The case of *Mott v. Pennsylvania R. Co.*, 30 Pa. St. 9, was a suit for injunction, against the railroad company and the governor and the treasurer of the state brought by the canal commissioners of the state as officials and as individual taxpayers, to restrain the sale of property of the state under the provisions of an unconstitutional law. In sustaining injunction as a proper remedy, the opinion of the court delivered by Lewis, C. J. said:

"It is objected that the governor is not subject to this form of our jurisdiction. It is far from our intention to claim the power to control him in any matter resting in executive discretion. But the rule of law seems to be, that when the legislature proceeds to impose on an officer duties which are purely ministerial, he may be coerced by mandamus or restrained by injunction, as the rights of the parties interested may require. In such a case no individual in the land, however high in power, can claim to be above the law.

\* \* \* And if it be shown that the act under which he claims authority to dispose of the public property or to divest private rights, is unconstitutional and void, he may of course, like any other individual, be restrained from proceeding."

The case of *Lynn v. Polk*, 76 Tenn. 121, was an action to enjoin the acts of a state funding board under a law claimed to be unconstitutional and so held. The board was composed of the secretary, comptroller and treasurer of the state. It was contended that the action would not lie and that the court was without jurisdiction for the reason that the law of the state provided that no court in the state had jurisdiction to entertain any suit against the state or any officer of the state. In disposing of this contention the court said on page 152: "the men who shall for the time being fill these offices are designated, as the constituent elements, making up the unit created by the act, designated a funding board. This unit, so constituted, acts as one, any two of them constituting a quorum for the transaction of the business in hand. I cannot see how this legal thing thus created can be conceived of as an officer of the State. It certainly is not the comptroller, nor treasurer, nor secretary of the State, for it is inconceivable that the three men filling these offices should be combined into one, and be either officer. The acts of the board are no more the acts of these officers as such, than would be the case if one justice of the peace, one constable, and the sheriff of

Davidson county had constituted the board, would have made the act of the board the official act of either of these officers."

And it was, moreover, held that an officer of the state executing an unconstitutional law is not acting by authority of the state, and, therefore, that taxpayers, citizens of the state, could maintain a bill quia timet to restrain executive officers from proceeding under such unconstitutional and void law.

In *Pennoyer v. McConaughy*, 140 U. S. 1, injunction was granted against a board of land commissioners of which the governor, secretary of state and treasurer of state were members and it was said by Lamar, J.:

"It must be borne in mind that this suit is not nominally against the governor, secretary of state, and treasurer as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking any affirmative relief against the State or of any of its officers. \* \* \* All that

he asks is, that the defendants may be restrained and enjoined  
181 from doing certain acts which he alleges are violative of his contract made with the State when he purchased his lands.

He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. The case cannot be distinguished from *Osborn v. Bank of the United States*, *Davis v. Gray*, *Board of Liquidation v. McComb*, and *Allen v. Baltimore and Ohio Railroad Co.*"

It is a part of appellant's contention that, as the general rule is that courts will not issue writs that are unavailing, injunction should not be decreed in this. For it is assumed by counsel that the governor being invested by the constitution with supreme executive authority with control over the military forces of the state, the courts could not enforce the decree against the board of which the law makes him a member if he chose to disregard it. This consideration presents no reason for the court to refuse to exercise jurisdiction. It surely does not follow that compulsory action would be needed in aid of the writ. This is a government of laws and all are amenable to it. To the courts the people have given the power, and charged them with the duty to declare what it is; and this duty cannot be lightly disregarded however unpleasant and embarrassing it may be. Without the aid of sword or purse courts have met with little difficulty from disobedience of their decree and this had come equally from a generally conscientious discharge of duty by the courts and a respect for the law which is inherent in our people. Where the question presented to a court is a judicial question it would be sheer, inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect on any officer of a coordinate department by entertaining the assumption that the law as declared by the courts might be disregarded.

The further contention of counsel, that the court is without juris-

diction for the reason that courts may not interfere with legislative action, has for its basis the claim that, using the words of counsel, the writ of injunction in this case, if it does anything, restrains the enactment of a law which is upon its passage and which may not of course be done. Much of the argument of counsel is based upon the assumption, that in doing the thing sought to be done through Chapter 118 the general assembly was acting within its power and it falls to the ground with the determination of the contrary.

182 Since the act incorporating the proposed organic law was passed in the form of and in accordance with the prescribed rules of ordinary enactments; and since it provided rules of conduct for the action of certain officials, it must be subject to interpretation and construction of the courts. The work of the legislature in relation to it is at an end; it has passed beyond any further action of that body,—so far as the legislature is concerned it is a complete enactment. If the legislature was without power to formulate and present the proposed organic law to the people, as we have seen it was, Chapter 118 is void and the mandate of that body that the ballot shall be encumbered with the question of its adoption is of no more force than that of any citizen without authority under the constitution. The question involved is no more than whether ministerial acts threatened to be done in carrying out the provisions of an unconstitutional act may be enjoined. This, as we have seen, may be done. And there is also authority for the intervention of the courts before proposed constitutional changes have been passed upon by the votes of the electors and the result declared.

In the last case of *Carton v. Secretary of State*, 151 Mich. 337, it appears that the state of Michigan held a constitutional convention in 1907 and 1908. The act which called it provided that the result of its labors should be submitted to the people at the April election in 1908. The convention itself, provided that it should be submitted at the November election of that year. The secretary of state declined to obey the mandate of the convention, believing that that body was without power to direct and fix the time of submission. The president of the convention brought an action for a writ of mandamus to compel him to comply with the directions of the convention. The writ was awarded by the supreme court on the ground that under the constitution the authority to fix the time and manner of submission rested in the convention and that the legislature was without power in the matter.

Another case is that of *Wells v. Bain*, 73 Pa. St. 39. Citizens and voters of the State sued to enjoin commissioners of election under an ordinance of the convention to revise the constitution, and other election officers from expending any money in relation to the election and from holding such election, on the ground that the ordinance of the convention providing for the manner of holding the election on the proposed constitution was void. What was said by Agnew, C. J., on the question of jurisdiction is applicable to the question under consideration:

183 "The question of jurisdiction has been reserved for the conclusion. The first remark to be made is, that all the departments of government are yet in full life and vigor, not

being displaced by any authorized act of the people. As a court we are still bound to administer justice as heretofore. If the acts complained of in these bills are invasions of rights without authority, we must exercise our lawful jurisdiction to restrain them. One of our equity powers is the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals. Page v. Allen, 8 P. F. Smith 338, and the authorities cited by counsel are precedents sufficient to justify the exercise in this case. Here the court is asked to restrain a body of men attempting to proceed contrary to law—to set aside the lawful election system of the city, and substitute an unlawful system in its place. Their acts are not only contrary to law, but are prejudicial to the interests of the community, by endangering the rights of all the electors, through means of an illegal election held by unauthorized officers. In Patterson v. Barlow, 10 P. F. Smith, 54, the aid of the court was asked not to prevent acts contrary to law, but to strike down the only lawful system of election in the city, and thereby to disfranchise all its citizens, for all other election laws had been actually repealed. We said then it was more than doubtful how for private citizens can call for an injunction beyond their own invaded rights, or ask to restrain a great system of law in its public aspects. In this case we are called upon, not to strike down, but to protect a lawful system, and to prevent intrusion by unlawful authority. If this ordinance is invalid, as we have seen it is as to the city elections, the taxes of the citizens will be diverted to unlawful uses, the electors will be endangered in the exercise of their lawful franchise, and an officer necessary to the lawful execution of the election law ousted by unlawful usurpation of his functions.”

See also Wood's Appeal, 75 Pa. St. 59, which was also a suit for injunction growing out of the same ordinance.

In Warfield v. Vandiver, 101 Md. 78, the Court of Appeals of Maryland sustained the circuit court in issuing a writ of mandamus to require the governor to order publication of a proposed amendment to the constitution of that state.

In Commonwealth v. Griest, 196 Pa. St. 396; 50 L. R. A. 568, the same action was taken for the same purpose against the secretary of state.

The case of Livermore v. Waite, 102 Cal. 113, was a case in which at the suit of a citizen and taxpayer the secretary of state of California was enjoined from certifying a proposed constitution-amendment to the clerks of the various counties and from doing other acts toward the submission of it which would entail an expenditure of public money. The legislature had not strictly complied with the constitution and the supreme court sustained the injunction.

Holmberg v. Jones, 7 Idaho 752, was a case against the auditor of state for a mandamus to compel him to comply with an amendment claimed to have been adopted. The auditor defended on the ground that the amendment had not been legally adopted. The court said:

“It cannot be questioned but that any voter of the State, by proper

proceedings in the district court, or in this court, could have obtained a writ of prohibition restraining the Secretary of State from certifying the question of adopting said proposed amendment to the various county auditors. The official ballot could have been protected against the improper submission of such question, and could have been purged of the presence of such question thereon, by proper judicial proceeding."

In the case of *Tolbert v. Long*, 134 Ga. 292, an act had been passed by the legislature creating a board of county commissioners for the county of Madison and providing that the same should not go into effect until ratified by the vote of the people of the county. A citizen and taxpayer sued to enjoin the holding of the election under the act. The jurisdiction of the court was questioned and the availability of the remedy of injunction. The court upheld both, saying:

"If the legislative enactment proposed in the present case to become operative through the medium of a popular election be violative of the organic law of the land, it is the right of a taxpayer of the territory to be affected to say that the public funds shall not be used to defray the expenses of an illegal election. Besides, no adequate remedy at law occurs to us, to which the taxpayer might resort after the election had been duly declared in favor of the ratification of the enactment, wherein he could assert the unconstitutionality of the law. Certainly the remedy to enjoin the holding of the election would be more direct, and better calculated to avoid complications, than to remain passive until the law had been declared before beginning a proceeding to test its constitutionality. An instance is conceivable where a majority of the voters included within the limits of the territory to be affected might be decidedly of the opinion that the enactment was opposed to the constitution, and for this reason abstain from voting. If they refrained from voting, the law must be adopted, if at all, by a minority vote, or, if those voters take part, they must do so with the consciousness of participating in an illegality and running the risk of estopping themselves from thereafter calling in question the constitutionality of the act under which the election was held."

The case of *State v. Thorson*, 68 N. W. 202; *Threadgill v. Crass*, 26 Okl. 403, and *People v. Mills* (Cal.) 70 Pac. 322, state a different doctrine, but those states have different constitutions.

The power to control by mandamus and injunction the ministerial acts of officers in relation to elections under unconstitutional statutes has been declared by this court and courts of other states in apportionment cases. *Parker v. State*, 133 Ind. 178; *Brooks v. State*, 162 Ind. 568; *Fesler v. Brayton*, 145 Ind. 71; *State v. Wrightson*, 56 N. J. L. 126; 22 L. R. A. 518; *State v. Cunningham*, 81 Wis. 177; *State v. Cunningham*, 83 Wis. 90; *State v. Van Dryn*, 21 Neb. 586; See also *Conner v. Gray*, 88 Miss. 489.

Many of the decisions reviewed above establish the capacity of the appellee to sue in such a case as this and with this view our own cases are in harmony. *Harney v. Indianapolis etc. R. Co* 32 Ind. 218; *Board v. Markle*, 46 Ind. 296; *English v. Smock*, 34 Ind. 115; *Denny v. State*, 141 Ind. 503; *Fesler v. Brayton*, 145 Ind. 17;

Brooks v. State, 162 Ind. 568; Remster v. Sullivan, 36 Ind. App. 385; Gemmer v. State, 165 Ind. 158; Spencer v. Knight, this term.

The small proportionate sum of the cost of the election which would fall upon appellee as a taxpayer is not of itself sufficient to destroy his competency to sue. "Where a suit is brought by one or more, for themselves, and all others of a class, jointly interested, for the relief of the whole class the aggregate interest of the whole class constitutes the matter in dispute." *Brown v. Trousdale*, 138 U. S. 389.

The great importance of the case, involving as it does so vitally the organic law of the state and the relationship of all of the departments of government established by it, has compelled the most thorough, careful, and solemn consideration of this court. To the reluctance of courts to declare an ordinary enactment of the legislative body void because in conflict with the constitution, has been added other restraining and embarrassing elements, in that as stated all three governmental departments are involved. In the determination of the difficult and delicate questions presented we acknowledge the aid we have received from the industry and ability of the trial judge and the attorneys in the case.

We find, as indicated, that the act of March 4, 1911, known as Chapter 118, is in violation of the constitution and void and 186 the judgment of the lower court is affirmed.

Morris, J., and Spencer, J., dissent.

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*Dissenting Opinion.*

MORRIS, J.:

I cannot concur in the majority opinion, and the importance, as well as the novelty, of the questions involved, constrain me to state the reasons for dissenting.

The General Assembly of 1911, passed an act to submit to the electors of the state at the general election of 1912, for ratification or rejection, a proposed "new constitution," set out in the body of the act, Acts 1911, p. 205.

For the most part, the proposed "new constitution" is a copy of the present one, the most prominent changes being in authorizing the legislature to enact a workman's compensation law; in changing the number and apportionment of representatives in the legislature; in authorizing the Supreme Court to consist of eleven instead of five members; in requiring certain qualifications for voters; and in authorizing the legislature, on petition of twenty-five per cent of the voters, to adopt laws providing for the initiative and referendum, and for the recall of officers, other than judges.

The act provides that the proposed constitution shall go into effect January 1, 1913, if ratified by the voters.

By an act concerning elections, approved March 6, 1889 (Acts 1889, p. 157, Burns Stat. 1908, 6882 et seq.) among other things,

it is provided that the Governor and two electors of the state, by him appointed, shall constitute a State Board of Election Commissioners, whose duty it shall be to prepare and distribute ballots at state elections. Section 62 of the act (Burns Stat. 1908, sec. 6944) requires the board, "whenever any *constitutional amendment, or other question*, is required by law to be submitted to popular vote" to cause a brief statement of the same to be printed on the state ballots, and the words "Yes" and "No," under the same, so that the elector may indicate his approval or disapproval of the constitutional amendment, or other question, submitted.

Section 25 of the act (Burns Stat. 1908, sec. 6907) requires the Secretary of State, whenever such amendment, or question is to be submitted, to certify the same to the clerks of the circuit courts of the state, not less than thirty days before the election.

The complaint, among other things, alleges that the legislature of 1911 was without power to propose for submission to the electors, the instrument in controversy; that the latter is not, in fact, a new constitution, but is the present one with a series of amendments, and its submission to the electors in 1912, conflicts with our constitution which requires amendments thereto to be considered by two sessions of the legislature before submission to popular vote; that the proposed constitution, in authorizing, under certain conditions, the legislature to adopt laws for the initiative and referendum, conflicts with the Federal Constitution, which guarantees to every state a republican form of government, and is also void because of its provisions relating to the apportionment and representation in the legislature.

In his complaint, plaintiff further avers that "he himself, and all the electors and other citizens of the state *have the right to have it determined, decided, and adjudicated and published by the courts so as to know before the election \* \* \* whether the said act is a constitutional exercise of the legislative power of the General Assembly, and whether if adopted, said new constitution would be valid or void.*"

(Italics here and throughout opinion, mine.)

The court states in its special finding of facts, among other things, that plaintiff is a citizen, elector and taxpayer of Washington township, Marion county, and owns property assessed at \$24,840.00; that the assessed value of all the property in Indiana is \$1,843,341,000.00; that unless enjoined defendants will perform several acts, relating to this instrument, required of them by statute.

It is further found that the expense of submission, "to be paid out of the treasury of the state and the several counties \* \* \* will aggregate in all between \$1000.00 and \$2000.00."

The court stated its conclusions of law in substance, as follows:

The act of 1911, submitting the proposed new constitution to the voters, is void because (1) of lack of power in the legislature to propose and submit the same; (2) because the instrument was proposed in violation of our present constitution; (3) because the instrument is in violation of articles 2, 4, and 5 of the ordinance adopted July 14, 1787, by the Congress of the Confederacy of the



United States of America, and — violation of section four of the act of Congress of the United States of America enabling the people of Indiana to form a state government, and violative of the ordinance of the people of the Territory of Indiana, adopted 189 June 29, 1816, securing to the people of Indiana proportionate representation in the legislature; and (4) because the instrument is violative of the Virginia act ceding to the United States the Northwest Territory, which provided that the States formed therefrom should be republican, when admitted as members of the Federal Union, and violative of article 5 of the ordinance of 1787, declaring that the states formed in such territory shall be republican in form, and violative of section 4 of the act of Congress of April 16, 1816, enabling the people of Indiana Territory to form a state government, providing that the same when formed should be republican, and violative of section 4 article 4 of the Federal Constitution which secures to each state a republican form of government. The fifth conclusion is that plaintiff is entitled to an injunction against Ellingham, Secretary of State, prohibiting him from certifying, before the election, to the several clerks, the proposed constitution; and the sixth is that Governor Marshall, and Bachelder and Roemer, constituting the Board of Election Commissioners, should be enjoined from causing any statement of or concerning the proposed constitution to be printed on any ballots to be used by the voters at the general election in November, 1912, or any election to be held in Indiana.

Each defendant excepted to each conclusion of law.

The defendants separately and severally moved in arrest of judgment, asserting, as grounds therefore, that the court had no jurisdiction of the subject-matter; that the court was without jurisdiction to enjoin the Governor of the State; that the court is without power to interfere with the executive department of the state in the discharge of its functions; that "the courts are not given a prerogative to guard the people against themselves in the matter of adopting organic law;" that a judgment pursuant to the conclusions of law would involve a usurpation of power by the judicial department; that the court has no power to determine political questions, or enjoin legislative action.

The Governor separately filed a like motion.

Appellants insist here, among other things, that the Court erred in each of its conclusions of law, and was without jurisdiction over the subject-matter of the action.

The question of jurisdiction is never a technical one, and where it appears that the lower court was devoid of power to determine the matters in issue, it is not only unnecessary, but improper, for this court to consider any other question presented. *Smith v. Myers*, 109 Ind. 1, and cases cited; *State v. Thordon*, 9 S. D. 149.

Appellants contend that, as to the Governor, the court was without jurisdiction, because it has no power to restrain the head of the executive department of the government.

Jurisdiction is the power to hear and determine a matter in con-

trovery, and to carry into effect the judgment rendered. *Smith v. Myers*, 109 Ind. 1; *Robertson v. State ex rel.*, 199 Ind. 79; *People v. Morton*, 156 N. Y. 136, 41 L. R. A. 23; 1 Blackstone Com. 242; 3 Bouv. Inst. 71; *Cooley's Const. Lim.*, 575; *Hopkins v. Com.* 3 Mete. 460.

In 1 Blackstone Com. on page 242 it is said:

"All jurisdiction implies superiority of power; authority to try would be vain and *and* idle, without an authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it."

Equity acts primarily *in personam*. An injunction decree can only be enforced against one refusing to obey it, by contempt proceedings. 16 Cyc. 499. It is insisted by appellants that circuit courts may not imprison the Governor of the state for disobedience of an order relative to his official acts, and, consequently there is no power to make the order.

Cases where injunctive relief have been sought against a Governor are rare, but the courts have frequently been called upon to issue writs of mandate against chief executives in cases where it was claimed no executive discretion was involved. On this subject there is a conflict of authority, both in the adjudicated cases, and in text book authorities. *Hovey v. State ex rel.*, 127 Ind. 588 (592.)

In *Cooley's Const. Lim.*, on page 62 (7th ed.) it is said:

"It may be proper to say here, that the executive, in the proper discharge of his duties under the constitution, is as independent of the courts as he is of the legislature."

In *Gray, Governor, v. State, ex rel.*, (1880) 72 Ind. 567, it was held by this court that an action for mandamus would lie against the Governor and certain state officers to compel the redemption of certain state bonds. This decision was on the ground that the duty enjoined on the Governor was in no way executive but was purely ministerial.

In *Hovey v. State ex rel.*, *supra*, (1891) the Gray case was distinguished, and while it was not expressly overruled, it evidently would have been had such action been deemed necessary, as will appear from the authorities reviewed in the opinion, and the court's conclusions thereon. One of these authorities is *People ex rel. Sutherland v. Governor*, 29 Mich. 320 (opinion by Judge Cooley) from which the court quoted the following (p. 593):

"The apportionment of power, authority and duty to the Governor, is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous, if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or law, but also to assert a right to make the Governor the *passive instrument of the Judiciary* in executing its mandates within the sphere of its own duties."

After citing authorities that hold that the courts have jurisdiction to compel the chief executive of a state to perform an act which is purely ministerial in its nature, this court said in its opinion (127 Ind. p. 595-596):

"The cases above cited, as well as all others of the same class, seem to rest chiefly upon the dictum of Chief Justice Marshall in the case of *Marbury v. Madison*, 1 Cranch, 137. \* \* \* We are not justified in assuming that Chief Justice Marshall would have used the same, or similar language, had the action been brought against the President of the United States, nor do we think the case is in point in an action against *the chief executive of the state*. \* \* \* The cases therefore, above cited, resting on the case of *Marbury v. Madison*, in which it is held that the chief executive of a state may be compelled, by *mandamus*, to perform ministerial duties, rests upon authority which does not sustain the conclusion reached, and  
192 *should not be followed.*"

In the same opinion, this court further said (p. 599) regarding the attempt of one department of our government to perform duties imposed on another:

"Such attempt would be usurpation, more dangerous to free government than the evil sought to be corrected. Should we attempt to control the Governor \* \* \* we would be taking one step in the direction of absorbing the functions of the executive department of the State."

In *Hartrcraft's Appeal*, 85 Pa. St. 433, 27 Am. R. 667, cited with approval in *Hovey v. State*, *supra*, the lower court issued a writ of attachment against Governor *Hartrcraft*, and some other state officers, to compel them to appear as witnesses before a grand-jury that was investigating a matter growing out of riots which occurred in 1877. It was insisted by the Governor that he was not liable to attachment for disobedience of the writ of subpoena. After setting out the provisions of the state constitution (which are substantially the same as ours) the Supreme Court of Pennsylvania says:

"Who then shall assume the power of the people, and call this magistrate to an account for that which he has done in the discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any other court get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander in chief of the militia of the Commonwealth? \* \* \* If the court of Quarter Sessions of Allegheny county can shut him up in prison for refusing to appear before it, \* \* \* why may it not commit him for a breach of the peace \* \* \* resulting from the discharge of his duties as commander in chief? \* \* \* In other words, if, from such analogy, we once begin to shift the supreme executive power from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work  
193 thoroughly and constitute the courts the absolute guardians  
*and directors of all governmental functions whatever.* \* \* \*  
We need not waste time in the attempt to prove that this proposition

is not allowable; that the Governor cannot be thus placed under the *guardianship and tutelage of the courts*. To the people, under the methods prescribed by law, not to the courts, is he answerable for his doings or misdoings."

In *People ex rel. v. Morton*, 156 N. Y. 136, 41 L. R. A. 232, where a writ of mandamus was sought against a board of which Governor Morton was a member, the court said:

"But again it is contended that in this case the executive is one of the board of officers, and that the board may be compelled to act by mandamus. Conceding him to be one of a board of public officers, the duty is one that devolves upon him by virtue of his office. If the courts have not power over his person to enforce its decrees in one case, they have not in the other.

We have already referred to the discussion of Judge Cooley in the *Sutherland* case (*People ex rel. Sutherland v. Governor*, 29 Mich. 320, *supra*) with reference to the grade of duties imposed upon the executive, including ministerial acts, together with those involving executive judgment and discretion; and without repeating his argument here, it seems to us that his reasoning is unanswerable and his conclusions correct."

Judge Cooley says in the *Sutherland* case:

"There is no very clear and palpable line of disetinction between those duties of the Governor which are political, and those which are to be considered ministerial merely, and, if we should undertake to draw one, and declare that in all cases falling on one side of the line, the Governor was subject to judicial process, and in those falling on the other, he was independent of it, we should open the doors to an endless train of litigation. \* \* \*

194     However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons."

In *Jonesboro v. Brown*, 8 Baxt. 495, 35 Am. R. 713, the Supreme Court of Tennessee said:

"The Governor holds but one office, that is the office of Chief Executive. Any duty which he performs under authority of law is an executive duty, otherwise we would have him acting in separate and distinct capacities. In some respects he would be the chief executive, an independent department of the government; as to other duties he would be a mere ministerial officer, subject, to the mandate of any judge of the state, and we must assume also that the judge would have the power to imprison the Governor if he refused to obey his order, for if the court has this jurisdiction the power to enforce the judgment must follow."

In *Frost v. Thomas, Governor*, (1899) 26 Colo. 222, an action was brought to restrain the governor from appointing officers for a newly created county under an alleged unconstitutional act. In its opinion, the Supreme Court of Colorado said:

"But when the governor, in pursuance of his executive authority, recognizes an act as legal, and is preceeding to execute its provisions,

the courts cannot directly interfere with the discharge of his duties under it, merely because it is alleged that such an act is unconstitutional; \* \* \* and if the judicial department of the state should attempt, in a proceeding of this character, to compel the chief executive to refrain from the performance of his duties, under the act creating the new county, it would be an *usurpation of authority*." \* \* \*

195 In *State v. Governor*, 25 N. J. Law, 331, in a mandamus action against the Governor, the supreme court of that state said:

"All executive duty is required to be executed *by a higher authority than the order of this court*, viz: by the mandate of the constitution. *The absence of discretionary power* cannot change the character of the act, or warrant the interposition of the judiciary. \* \* \* While it is the acknowledged duty of courts of justice to exert all their appropriate powers for the redress of private wrongs, it is no less a duty sedulously to guard against any encroachment upon the right, or usurpation of the powers, of the co-ordinate departments of government. In the delicate and complicated machinery of our republican system, it is of the utmost importance that each department of the government should confine itself strictly within the limits prescribed by the constitution."

In both the New Jersey and Colorado cases, the proceedings were commenced in the Supreme Court.

In *Mississippi v. Johnson*, 4 Wall, 475, a bill was sought to be filed in the Supreme Court of the United States by the state of Mississippi against Andrew Johnson, President, to enjoin him from enforcing certain alleged unconstitutional acts of Congress. In denying the injunction, the court, by Chief Justice Chase, said:

"The single point which requires consideration is this; can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional. \* \* \* The duty thus imposed \* \* \* is purely *executive and political*."

An attempt on the part of the judicial department \* \* \* to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance." \* \* \*

196 It will hardly be contended that Congress can interpose in any case to restrain the enactment of an unconstitutional law, and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident, and the execution of that purpose certain, *be distinguished in principle from the right to such interposition against the execution of such a law by the President?* \* \* \*

Suppose the bill filed, and the injunction prayed for allowed. If the President refuses obedience, it is needless to observe that the court is *without power to enforce its process*. If, on the other hand, the President complies with the order of the court, and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? *May not the House of Representatives impeach the President for such refusal?* And in that case could this court inter-

fere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the *public wonder of an attempt by this court to arrest proceedings in that court?* These questions answer themselves."

Under our laws, writs of injunction and mandate issue only from circuit and superior courts, the Supreme and Appellate courts not having such power except in aid of their own jurisdiction. There are more than sixty circuit, and more than a score of superior court judges in this state. The Governor is a member of numerous boards, the other members of which reside in various counties. Any circuit or superior court of the state might acquire jurisdiction of the person of the Governor in a suit against the members of such boards. Indeed, had either member of the Board of Election Commissioners resided in Vanderburgh county this cause might have been instituted there.

Circuit court judges may err. Indeed the power to determine a cause involves the power to decide it erroneously. The circuit court of Vanderburgh county might order the Governor by mandate (assuming the power to make and enforce the orders) to do a particular thing, and that of Lake county might enjoin him from doing  
197 a precisely similar act, and if he accept the construction of the law adopted by the Vanderburgh court, and obey it, he must pay the penalty of such obedience by removing his official residence to the Lake county jail. It might be possible, by various mandamus and injunction suits, to keep the Governor in jail during his entire term of office, because he obeyed the law as construed by various circuit courts in writs of mandate, provided he were not in the meantime impeached for such obedience; and it might turn out after all, that the injunctions he disobeyed, were erroneously issued. Surely it was never contemplated by the builders of the government of the sovereign State of Indiana that any such spectacle of anarchy should be exhibited for public bewilderment. And if it be conceded that the court is without power to enforce its order of injunction against the Governor, the case against him ends, for, as said by Blackstone, the order of a court would be contemptible if there be no power of enforcement.

It is suggested that in performing a duty under the election laws the Governor is merely acting as a member of the election board and is not performing an executive duty devolving on him as governor. This idea is illusory. *Mississippi v. Johnson*, supra; *Georgia v. Stanton*, 73 U. S. 50; 2 High Inj. § 1323 (4th ed.). The constitution prohibits the Governor from holding any other office. He can perform no official duty except it be enjoined on him as the governor. The plaintiff in his complaint recognizes this because he says "Thomas R. Marshall, because he is Governor of Indiana" is a member of the board.

The overwhelming weight of American authority is against the recognition of any distinction between ministerial and executive acts

of the Governor in such cases as this. In 2 Spelling on Extraordinary Relief, sec. 1206, it is said:

"The doctrine denying the right of interference even with respect to duties usually considered as ministerial is supported by the clear weight of authority." High Ex. Rem., sec. 120; Mevill Mandamus, sec. 97.

But, in no event, can it justly be said that the Governor is acting in a ministerial capacity, in refusing to enforce a statute because of its alleged unconstitutionality. Ministerial officers may not contest the constitutionality of a statute as a defense in proceedings against them for *disobeying* its mandates though they may do so in proceedings to *enforce* the performance of a statute. 8 Cyc. 789; Hall v. People, 90 N. Y. 498; Newman v. People, 23 Colo. 300; Board v. Kenan, 112 N. C. 566; State v. Board, 56 N. J. Law 258.

The presumption is that a statute is constitutional. This presumption is recognized by the courts, is binding on the executive, and surely binds ministerial officers. As said by the supreme Court of North Carolina in Board v. Kenan, 112 N. C. 566,

"if every subordinate officer in the machinery of the state government is to assume an act of the legislature to be in violation of the constitution, and refuse to act under it, it might greatly obstruct its operation and lead to most mischievous consequences."

Our courts of last resort in considering the question of the constitutionality of a statute, "exercise the gravest duty of a judge," and such duty will not be exercised in any doubtful case, nor then, unless necessary, and on the application of one interested. 8 Cyc. 787.

What is a ministerial act? This court has often defined it as one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, *without regard to, or the exercise of his own judgment upon the propriety of the act being done*. Flournoy v. Jeffersonville, 17 Ind. 169; Galey v. Board, 174 Ind. 181.

The plaintiff in this case sues the Governor because he has decided to execute a law relating to submitting a certain question to the voters. Appellee claims it unnecessary to submit the question—the proposed new constitution—because, even if ratified, it will be void. Had the Governor decided the proposed instrument will be void, if ratified, and had he further decided that because thereof it was not necessary to execute the law of 1889 this suit might not have been brought by appellee. But no one will contend that the Governor could be excused from violating the act of 1889, requiring him to submit the question, unless he had previously decided, in the faithful exercise of his judgment and discretion, that if ratified, the proposed constitution would be invalid.

In Carr v. State, (1911) 93 N. E. 1071, this court said:

"The power given to courts to over-throw an act of the legislature is the highest and most solemn function with which they are vested."

This rule is universally recognized. Can it be said that a Governor in deciding to disregard a statute is vested with a lower or less solemn function? If not, can it with any pretense of reason be said that in such case, the act is ministerial, because it involves *no exercise of judgment*?

Never has it been claimed that the law is an exact science. Is there concealed somewhere in the universe a device which automatically registers with mathematical precision the correct answers to constitutional questions? If there is, and if the Governor must be deemed, in performing his duties, to have availed himself of the use thereof, it seems unfortunate that the courts might not discover the device. That the determination of such questions involves the exercise of the highest judgment and discretion is shown by this court's opinions where former decisions have been overruled, and, even in the same case.

In *Smith v. Board*, 89, N. E. 867,—a case of interest to nearly all the taxpayers and citizens of Indiana—it was held without dissent that many sections of the act concerning highways were unconstitutional and void. The opinion was filed November 18, 1909. A petition for rehearing was filed and granted, and it was finally held, in an opinion filed January 25, 1910, that said sections in controversy were valid and constitutional, *Smith v. Board*, 173 Ind. 364. Had the Governor, instead of this court, in November 1909, decided these sections unconstitutional, and refused to enforce them, can it be said justly that such action would have been merely ministerial.

While the right, by mandate, to order the Governor to perform purely ministerial duties has been recognized in some early cases by this court, it was held later in *Hovey v. State*, 127 Ind. 588 (596) that the cases on which such authority rested "should not be followed," and this holding is in consonance with the weight of authority. No state court has ever held that a governor may be enjoined from executing a statute because of its alleged unconstitutionality. The Supreme Court of the United States has held that the President could not be enjoined. *Mississippi v. Johnson*, *supra*.

Some cases have been cited showing injunctions granted by Federal courts against state executive officers in relation to the enforcement of acts of state legislature, void by reason of conflict with the Federal Constitution; these cases are not in point here. The distinction was pointed out in *Bates v. Taylor*, 87 Tenn. 319, 3 L. R. A. 316, in the following language:

"Now, the most that can be said of these cases, is that they show the jurisdiction of the Federal Courts to restrain the Governor of a state from doing a wrongful act to the injury of individual rights. It is not even intimated in any one of them that the state courts have any such jurisdiction. There is a wide difference between the relation of the Federal judiciary and the state judiciary to the Governor of the State, and because of that difference the Federal decisions referred to are not at all in point in this case."

"A state's judiciary sustains the same relations to its Governor



that the Federal judiciary does to the President of the United States, and as a state court, by reason of that relation, has no jurisdiction to coerce or restrain the Governor with respect to his official duties, so the Federal courts, for the same reason, have no power to interfere with the official actions of the President."

The doctrine of recognizing a power in the courts to enjoin a governor from executing the acts, of a co-ordinate department of the government, would involve a theory of tutelage and guardianship of the executive, by the judiciary, as novel as it would be intolerable. The inevitable result of such rule would be the absorption of all governmental power by the judicial department. Legislatures might just as well be enjoined in the first instance from enacting laws, for as said by the supreme court of the United States, there is no difference in principle; and forms may always be disregarded. The expense of publishing the proposed constitution in the acts of 1911, might have been saved by enjoining the legislature from submitting it to the people, and no different principle would have been involved from the one here. *Mississippi v. Johnson*, supra.

The analysis of government into three powers is as old as Aristotle, but to Montesquieu must be given the credit of developing the necessity of a separate department for the exercise of each of the three powers, to the end that civil liberty may be secured. In the formation of our American States, this division of power, except as expressly qualified, was made a fundamental principle. *Mauran v. Smith*, Governor, 8 R. I. 192.

201 Daniel Webster said: "A separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions, and doubtless, the continuance of regulated liberty depends on *maintaining these boundaries*," Webster's Works, Vol. 4, page 122.

The history of the decline and fall of republics from the Grecian Democracies to the time of the adoption of our American Constitutions, is a story of usurpation of power, growing from slight encroachments, increasing gradually, sometimes by imperceptible advances, but each infringement furnishing an excuse for another trespass, until the governmental structure either fell or became the citadel of arbitrary power.

A court of equity regards the substance, and not the form of an act. This judgment, stripped of its forms, stands revealed as the edict of the Marion Circuit Court, addressed to the electors of Indiana and forbidding them to incorporate into their organic law the changes proposed. Such in form is not the order, but by enjoining the Governor and other officers from furnishing the voters with a certain kind of ballot—their only means of acting—the substantial end is reached of enjoining the electors from voting on a proposed constitutional change.

Our American Constitutions were erected by architects of consummate skill. Their foundations were supposed to be indestructible. Warned by the history of the Grecian and Italian republics, our fathers erected what they supposed were insurmount-

able barriers between the different departments of government. There are found in all the constitutions similar provisions, in this respect; that of Indiana being as follows:

"No person charged with official duties under one of these departments, shall exercise any of the functions of another." Const. Art. 3.

Our type of constitution has been copied by nearly all the governments of the Western Hemisphere, has served as the model for modern European republics; and at this time, just when the people of the world's most densely populated empire are seeking relief from usurped power by adopting our form of charter, ordained "To the end that justice be established, public order be maintained and liberty perpetuated," it is indeed unfortunate if the Supreme Court of Indiana should adopt a rule, which only a few months ago the Supreme Court of the United States declared, without dissent, involves a power in the judiciary, to build a new government on the ruins of the present one. Pacific etc., 202 Tel. Co. v. Oregon (U. S.), decided Feb. 19, 1912.

The lower court erred in holding that the Governor may be enjoined.

Appellants contend that the court erred in concluding as a matter of law that the provision of the proposed constitution empowering the General Assembly to legislate in reference to the initiative and referendum is in conflict with the provisions of the Federal Constitution which guarantees to each State a Republican form of Government; that the question is a legislative or political one over which the courts have no jurisdiction.

When this cause was heard in the circuit court there was pending in the Supreme Court of the United States the case of Pacific States Telephone and Telegraph Company against the State of Oregon, which involved this identical question. The appellee here, and his learned counsel, Hon. Addison C. Harris, as *amici curiæ*, by leave of court, filed a brief in the Oregon cause, contending there, as in the Marion Circuit Court, for the rule declared by the latter.

The Oregon case was decided in February 1912. The opinion was rendered by Chief Justice White, all the justices concurring. In the course of the opinion it was said:

"We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form, and to enforce the guaranty of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practice of the government from the beginning, to be *political* in character, and therefore not cognizable by the judicial powers, but solely committed by the Constitution to the judgment of Congress. \* \* \*

Before immediately considering the text of section 4 of Article 4, in order to uncover and give emphasis to *the anomalous and destructive effects upon both the state and national governments which*

*the adoption of the proposition implies*, as illustrated by what we have just said, let us briefly fix the inconceivable expansion  
 203 of the judicial power and the *ruinous destruction of legislative authority in matters purely political* which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. \* \* \*

"And as a consequence of the existence of such judicial authority, a power in the judiciary must be implied, unless it be that *anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one*.—a right which, by its terms, also implies the power to control the legislative department of the government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority. Do the provisions of section 4 article 4, bring about these strange, far-reaching, and injurious results? That is to say, do the provisions of that article obliterate the *division between judicial authority and legislative power upon which the Constitution rests*? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it, and *thus overthrow the Constitution* upon the ground that thereby the *quaranty to the states of a government republican in form* may be secured,—a conception which, after all, rests upon the assumption that the states are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the nation."

"We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the  
 204 letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

"In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other, suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case,—*Luther v. Borden*, 7 How. 1, 12 L. ed. 581. \* \* \*

"It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. \* \* \*

"As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial

power, it follows that the case presented is not within our jurisdiction."

It would seem that nothing need be added here to what was said by the Supreme Court of the United States, were it not for the fact that in this case the further question is presented of a conflict with the ordinance of 1787, and the Virginia Act of 1783.

In 1783, when the Northwest Territory was a wilderness, it was ceded by Virginia to the United States. In the act of cession it was provided that the territory ceded should be formed into distinct republican states. The ordinance of 1787 provides, among many other things that the inhabitants of the territory shall ever be entitled to a proportionate representation of the people in the legislature, and that the states formed in the territory shall be republican.

The right of trial by jury (of twelve) was secured and it was guaranteed that the title of the Indians to their lands should not be taken from them except by their consent.

Article four provided that the territory and the states that may be formed herein "shall ever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation."

It is appellee's theory, adopted by the trial court, that the provisions of the above two instruments are binding here, and that the initiative and referendum clause, and other matters in the proposed constitution, are in conflict with the provisions of each of the above instruments, and that the court has jurisdiction to declare the proposed constitution void, for such reasons.

That the people of any of the sovereign states carved out of the Northwest Territory are bereft of power, for instance, to reduce the number of jurors composing a jury to less than twelve, regardless of amendments to state or Federal Constitutions, because of the provisions of the ordinance of 1787, would be but one of the many remarkable situations that would result from the position taken by appellee and the lower court. On such theory, we are confronted with a situation, not only as was said in the Oregon case, as between anarchy or building "by judicial action upon the ruins of the previously established government, a new one," but even such new one established by a judicial oligarchy must ever be fettered by the provisions of the ordinance of 1787. It would appear that the statement of the proposition suggests the proper answer.

The question involved on this branch of the case is purely political, and one over which the courts have no jurisdiction, and the Marion Circuit Court erred in holding otherwise.

Appellants next claim that the facts found *do* not warrant injunctive relief, because no substantial, positive injury *is* made to appear; because the cost to plaintiff of submitting the proposed constitution is too trifling for consideration; that neither in person nor in property can appellee be affected, unless the instrument be ratified next November by the voters, which renders the question a speculative one merely; and because courts have no jurisdiction to enjoin the people from making constitutions, or from voting.

That a taxpayer may, by a suit in equity, enjoin the unlawful levy

of a municipal tax, or enjoin the unlawful expenditure of public funds, whether he owns much or little property, is too well settled to require the citation of authorities. But this action cannot be fairly termed a taxpayer suit.

That a paragraph of complaint must pursue a single definite theory is settled. Our code (Burns Stat., 1908, sec. 343) requires that each cause of action shall be distinctly stated in separate paragraphs where the complaint contains more than one cause. While this alleges that appellee is a taxpayer, and that the action is brought for all the electors and taxpayers of the state, it cannot be believed that the appellee and his eminent counsel—both of whom have devoted their lives to the practice of law in Indiana, and are thoroughly familiar with our code—intended to state in a single paragraph of complaint, two or more causes of action. And while no demurrer nor motion to separate was filed in the court below, it is proper here to consider the theory of the complaint, which, in case of doubt, is determined by the general scope and character of the pleading. The theory most prominent in the complaint is that a cause of action brought by a citizen and elector, and the references therein to the plaintiff as a taxpayer should be either disregarded as surplusage, or regarded as subsidiary averments in a complaint treated as filed by the plaintiff in his capacity as citizen and elector. That appellee himself attaches but little importance to the taxpayer feature of his complaint is evidenced by the scant attention given it in his brief.

Even if the complaint be deemed a suit in equity by a taxpayer, the facts found do not entitle appellee to any substantial relief. Expenses of holding state elections are borne in part by the treasuries of the several counties, and in part by that of the state. The court finds that the total cost to be occasioned will aggregate from \$1000.00 to \$2000.00, and that such expense will be borne by the state and several county treasuries. It fails to find any specific amount to be borne by the treasury of the state or that of Marion County—the only two in which plaintiff is interested. If all the expense were to be borne by the state treasury—which cannot occur—plaintiff's share of the \$1000.00 would be about three cents—an amount so trifling as to invoke the doctrine of *de minimis non curat lex*. 1 Pomeroy Eq. Rem. 331; 1 High on Injunctions, sec. 22; State v. Thorson, 9 S. D. 149.

Only one case similar to this one has been called to our attention. But if appellee's contention, that the proposed constitution is not a new one, but merely a series of proposed amendments, be correct, then the case of State v. Thorson, (1896) 9 S. D. 149, is in point on every proposition involved in this branch of the discussion. In that case a suit was filed in the Supreme Court of South Dakota to enjoin the Secretary of State from certifying to county officers a proposed constitutional amendment. The court said:

"The relator is an elector and taxpayer. Defendant intends to, and will, unless restrained by injunction or other legal process, certify the question as a proposed constitutional amendment. The relator contends that the passage of the resolution, and the submission of the question embraced therein, are steps in an attempt to

amend the state constitution; that the methods prescribed for its amendment have not been complied with; therefore defendant has no authority to certify the same. \* \* \* He claims \* \* \* that the constitution will not be changed, whatever reply may be returned. \* \* \*

"It is a familiar principle that substantial and positive injury must always be made to appear to the satisfaction of a court before it will grant an injunction, and acts which, however irregular and unauthorized, can have no injurious results, constitute no ground for relief. 1 High Inj. sec. 9. The party seeking an injunction must show, not only a clear legal right, but a well grounded apprehension of immediate injury. An injunction will not be granted where the injury is doubtful, or the violation of complainant's rights is merely speculative. Injury material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable result of the action to be restrained. \* \* \* This court has no power to examine an act of the legislature generally and declare it unconstitutional. The limit of our authority in this respect is to disregard, as in violation of the constitution any act or part of an act which stands in the way of the legal rights of the suitor before us. \* \* \* It has not been shown, nor can it be imagined, in what manner the relator will be injured by the contemplated action of defendant. If the legislature has proceeded properly, and its proposed amendment shall be ratified by the people the relator will have no legal cause of complaint, because, as a good citizen of the

208 state, he will be bound to cheerfully accept the lawfully expressed will of a majority of its sovereign electors. If, on the other hand, the action of the legislature was such as to render any answer to the question inoperative, the constitution will not be modified, and no one will be affected. Any additional burden which might result to relator, as a taxpayer, by reason of submitting this question at a general election, is too trifling, fanciful, and speculative for serious consideration. \* \* \*

"There is another view, which involves the structure of the state government and the relation of its several departments. Should it be conceded that the relator has such an interest in the matter as entitles him to be heard, or that the action involves a question of such public concern as would warrant an attempt by the attorney-general to obtain an injunction, could this court issue it? *No precedent for such action has been presented by counsel or discovered by the court.* In discussing this phase of the case it will be assumed an amendment of the constitution was intended requiring the concurrent action of the legislature and electors. The former has acted. Its action will be communicated to the latter by means of defendant's certificate. Until the latter shall have expressed their approval, the proceeding is incomplete, and the constitution will remain unchanged. The proposed amendment is on its way to the electors. Can this court, at this time, impede its progress? Can it be called upon to anticipate conditions which may never exist? Can it interpose its process between the legislature and electors, who are alone with power to modify the fundamental law, before both have acted,

and while the matter is pending and incomplete? The powers of the state government are divided into three distinct departments,—the legislative, executive and judicial. The powers and duties of each are prescribed by the constitution. Const. Art. 2. Power to amend the constitution belongs exclusively to the legislature and electors. It is legislation of the most important character.

209 This court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution; but it cannot say what laws shall or shall not be enacted. It has the power and it is its duty, whenever the question arises in the usual course of litigation, wherein the substantial rights of any actual litigants are involved, to decide whether any statute has been legally enacted, or whether any change in the constitution has been legally affected, but it will hardly be contended that it can interpose in any case to restrain the enactment of an unconstitutional law. *Mississippi v. Johnson*, 4 Wall. 500. If the legislature cannot be enjoined when engaged in the enactment of unconstitutional statutes, it and the electors cannot be enjoined when engaged in an unwarranted attempt to amend the constitution. *To issue an injunction in this action would be to enjoin the legislature and electors in the exercise of their legislative duty.* Suppose a bill, having passed the legislature, is in possession of the governor, or to make the analogy more nearly complete, suppose it is being conveyed to the executive by an officer of the legislature, would any one imagine the progress of the messenger could be arrested by an injunction? The inquiry answers itself. *Is there any distinction in principle or reason between such a case and the case under discussion? Clearly none.* An injunction cannot be granted to prevent a legislative act by a municipal corporation. Comp. Laws, sec. 4650. The code expresses the settled doctrine in this respect. Spell, Extr. Relief, sec. 688. If courts cannot interfere with the legislative proceedings of a city council, they certainly cannot with like proceedings in the legislature itself. If they cannot prevent the legislature from enacting unconstitutional laws, they cannot prevent it and the electors from making ineffectual efforts to amend the constitution. The fact that the present attempt is without precedent is of much weight against it. *Mississippi v. Johnson, supra.*

210 The cogent reasoning of the South Dakota court applies with equal force here, for no one will pretend that the provisions of our proposed constitution can ever have the effect of law unless approved by the people next November; and not then, unless free from conflict with the Federal Constitution, and unless proposed in accordance with the terms of the present Indiana Constitution. The voters of the state may reject the instrument—and the only presumption now allowable is that they will do so if it violates the Federal Constitution, or was proposed in violation of our present one. In such event, the preparation of briefs here, aggregating five or six hundred printed pages; the oral argument, occupying thrice the time usually allowed; the long time necessarily spent by this court in

considering this appeal, with the resultant further postponement in considering others long pending, and where the questions are real, and not moot, the expense occasioned to the state and parties by this appeal, aggregating vastly more than that of submitting the proposed instrument, will have been each and all, in vain, for the writer feels assured that appellee will not contend that his motive in bringing this suit was to save his share of taxes to be caused by the submission, and amounting, as appellants' counsel facetiously remark, to the "price of a postage stamp." As appellants well say, if this suit be deemed one for all the taxpayers and voters of the state, no possible relief is demandable, for the simple reason that the voters and taxpayers of the state hold in their own hands the power of issuing an injunction from which no appeal is permitted, by simply discharging their duty at the polls.

But in the opinion of the writer the decision of this really moot question, in favor of appellee, includes a new and erroneous departure from established doctrines of the division of governmental powers. Holding elections and voting, involve the exercise of political powers only, and this injunction is really against the voters of the state. Heretofore courts of equity have ever been denied such power. *Landes v. Walls*, 160 Ind. 216; *Hovey v. State*, *supra*; *Smith v. Myers*, 109 Ind. 1; 1 *Pomeroy Eq. Remedies*, sec. 324, 331, 332; *Georgia v. Stanton*, 6 Wall. 59, 18 L. ed. 721; *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681 and cases cited; *Fletcher v. Tuttle*, 151 Ill. 41, 42 Am. St. 220; *Giles v. Harris*, 189 U. S. 475; *Larcom v. Olin*, 160 Mass. 102; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584; *Story v. Jersey City*, 16 N. J. Eq. 13; *Jones v. Black*, 48 Ala. 540; *Holmes v. Oldham*, 1 Hughes, 76; *Weber v. Timlin*, 37 Mich. 274; *Smith v. McCarthy*, 56 Pa. St. 359.

211 A further particular reason why courts should not enjoin the submission of proposed constitutional amendments by reason of some alleged infirmity, is because they must be voted on, if ever, on a fixed day. It might happen that this court should decide, as in the highway case of *Smith v. Board*, *supra*, against the constitutionality of an amendment proposed for submission, and in the mean-time, on petition for rehearing, *after the election*, reach a different conclusion. Such a situation might arise in this case. By assuming jurisdiction of such cases, the courts may deprive the people from amending their constitutions by their confessedly erroneous action, the correction of which is prevented by lapse of time.

My apology for this long dissenting opinion is found in the gravity of the questions presented, and which is fully recognized by the Supreme Court of the United States and those of other states, but which is not, in my judgment, properly realized in the majority opinion.

There was a time in the history of the English people, when, by the combined usurped powers of the executive and the courts, members of parliament were cast into prison, and its constitutional authority was insulted and derided by the courts until it almost ceased to exist. The Puritans, in despair, sought asylum in America. McCauly Hist. Eng. Vol. 1, p. 90. The court of Star-chamber, guiltiest



of all in usurping power, was abolished in 1640. 4 Black. Com. 267; Hallam Const. Hist. 258, 292. Since then no English court has deigned to dictate to Parliament what laws it should, or should not, enact.

The descendants of the Puritans took no small part in framing our early American Constitutions. In all these the independence of the legislative department was thought to be impregvably guarded. Const. Indiana, Art. 4, sections 8, 9, 16. All power is inherent in the people, (Const. Indiana Art. 1, sec. 1) and they alone may exercise the paramount legislative power of formulating a constitution. *State v. Thorson, supra*. If the courts may dictate to the people, in advance what provisions they may, or may not insert in their constitutions, they certainly cannot be denied the lesser power of dictating to the General Assembly what laws it may, or may not enact.

The plaintiff here comes into court, demanding in advance of the electors expression of approval or disapproval, of what he claims is a series of constitutional amendments, the determination and adjudication of their future validity, if approved, and if, in the opinion of

212 the court, there is a prospective invalidity, that the voters of Indiana be restrained from voting on the proposition, by enjoining the Governor and other officers from supplying them with ballots that are so printed as to enable them to express their choice. This remarkable prayer was granted by the lower court, and is sanctioned by the majority opinion here. Since 1640, the courts of English speaking peoples, have resolutely and invariably denied the existence of any such power, and I most earnestly protest against its revival now.

For the foregoing reasons, and ~~for~~ others set out in appellants' briefs, the circuit court had no jurisdiction of the cause of action, and the judgment should be reversed with instructions to sustain the motions in arrest of judgment.

Where the lower court has no jurisdiction of the subject matter of the action, it is improper for this court to consider other questions urged. *State v. Thorson, supra*.

Spencer, J. concurs in the above dissenting opinion.

213 It is therefore considered by the Court that the judgment of the Court below in the above entitled cause, be in all things affirmed at the cost of the appellants all of which is ordered to be certified to said Court.

And it is further considered by the Court, that the appellee recover of the appellants the sum of — for his costs and charges in this behalf expended.

THE STATE OF INDIANA,

*Supreme Court:*

I, J. Fred France, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said Court in the above entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said Court, at the City of Indianapolis, this — day of —, 191—.

—, C. S. C.

214 And afterwards, to-wit: on the 31st day of August, the same being the 84th Judicial Day of the May Term, 1912, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the Appellants by counsel and file their petition and brief for a rehearing, in the words and figures following: (Here insert).

And afterwards, to-wit: on the 18th day of October, 1912, the same being the 125th Judicial Day of the May Term, 1912, the following further pleas and proceedings were had herein:

Come now the parties by counsel and the Court being advised in the premises, overrules the petition for a rehearing heretofore filed herein by Appellants, in the words and figures following: (Here insert)

215 And afterwards, to-wit: on the 23th. day of November, 1912, the same being the 2nd Judicial Day of the November Term, 1912, the following further pleas and proceedings were had herein:

Come now the Appellants by counsel, and files in the office of the Clerk of the Supreme Court, their petition for the allowance of a writ of error, said petition being hereto next below attached, and being as follows:

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In the Supreme Court of Indiana.

No. 22064.

THOMAS R. MARSHALL, as Governor of the State of Indiana; MUTER M. BACHOLDER, Charles O. ROEMER, Composing the State Board of Election Commissioners of the State of Indiana, and LEW G. ELLINGHAM, as Secretary of State of the State of Indiana. Appellants,

vs.

JOHN T. DYE, Appellee.

To the Honorable Leander J. Monks, Chief Justice of the Supreme Court of Indiana:

Now comes Thomas R. Marshall, Governor of the State of Indiana, Muter M. Bachelder, Charles O. Roemer, members of the State Board of Election Commissioners of the State of Indiana, and Lew G. Ellingham, Secretary of State of the State of Indiana, and show to the Court that heretofore, to-wit: on the — day of June, 1912, there was tried in the Circuit Court of Marion County in the State of Indiana, a case in which the said John T. Dye was the plaintiff and your petitioners above named were defendants; that by his complaint

in said cause, the said plaintiff prayed for a writ of injunction restraining your petitioners as aforesaid from complying with the terms of an Act, approved March 4, 1911, providing for the submission to the voters of Indiana at the general election to be held on the first Tuesday after the first Monday in November, 1912, a new constitution, the same being Chapter 118 of the Acts of 1911, and from complying with the law of said State relative to the submission of constitutional amendments, or other questions to the people.

That upon the trial of said cause your petitioner, Thomas R. Marshall, as Governor of the State of Indiana, filed his motion in arrest of judgment, which said motion was in the words and figures following, to-wit:

"Comes now Thomas R. Marshall, as Governor of the State of Indiana, and moves the court that the judgment in the above entitled cause be arrested on the following grounds, to-wit:

"First. For the reason that the court has no jurisdiction over the subject-matter of this action.

"Second. (1) For the reason that the court has no power to enjoin or to enforce an injunction against the Governor of the State of Indiana.

(2) For the reason that 'the courts are not given a prerogative to guard the people against themselves in the matter of adopting the organic law.'

"Third. For the reason that the court does not have power, authority or right by injunction or otherwise to interfere with, control or impede the executive department in the discharge of its functions.

"Fourth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be a usurpation of judicial power.

"Fifth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Art. 4, Sec. 4, of the Constitution of the United States, which guarantees a republican form of government to every State of the United States.

"Sixth. For the reason that the court has no power, authority or right to decide political questions or to enjoin political action.

"Seventh. For the reason that the court has no power to enjoin legislative action.

"Eighth. For the reason that a judgment in accordance with the conclusions would be in contravention of Art. 1, Sec. 1, of the Constitution of Indiana, providing that 'All power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.'

"Ninth. For the reason that a judgment herein in accordance with the conclusions of law stated would be in contravention of Art. 3, Sec. 1, of the Constitution of Indiana, by which the government of said State is divided into three separate, co-ordinate and independent departments.

"Tenth. For the reason that the complaint herein wholly fails to state any cause of action.

"Eleventh. For the reason that the facts stated in the special finding of facts heretofore made wholly fail to establish any cause of action against the defendants."

That the said appellants, separately, each for himself, further moved in arrest of judgment in said cause, and set up in their said motions the same specific grounds therefor that are contained in the motion of said Thomas R. Marshall, as Governor of said State, above set out. That said motions were, and each of them was, by the Court overruled, to which ruling an exception was at the time reserved.

That your petitioners in said cause before said circuit court denied the right of said court to exercise authority over or to enjoin your petitioners, or any of them, from the discharge of their political duties on the ground that the exercise of such authority by such court, and the rendition of such judgment as was by said  
219 court thereafter rendered was repugnant to the Constitution of the United States, and particularly to Sec. 4, Art. 4 thereof, guaranteeing a republican form of government to the several states of the Union.

That the said John T. Dye asserted throughout said proceedings that the draft for a new constitution, which the general assembly had prepared for submission to the people of said State, was "void because violative of Articles 2, 4 and 5 of the Ordinance of Congress of July 14, 1787, and Sec. 4 of the Act of Congress approved April 19, 1816, to enable the people of the Indiana territory to form a Constitution and State government."

That your petitioners throughout said cause asserted and maintained that the Ordinance of 1787, as an instrument limiting the powers of government of the Northwest Territory and declaratory of certain fundamental principles to be incorporated in the organic law of the States therefrom created, ceased to be in itself obligatory upon such States and *and* after their admission into the Union.

That said court held that the said draft for a new constitution was void, and that its submission to the people ought to be enjoined because it did not conform to the requirements for proportionate representation as contained in said Ordinance of 1787.

That said court rendered judgment against your petitioner, Thomas R. Marshall, Governor of Indiana, and against Muter M. Bacheider and Charles O. Roemler, members of the State Board of Election Commissioners, and their successor or successors in office,

enjoining them, and each of them, from causing a brief statement, or any statement, of or concerning said proposed new  
220 Constitution to be printed on the State ballot, or any ballot or ballots, to be by them, or any of them, or their successor or successors, distributed and used by the electors of the State of Indiana at the next general election to be held in the State of Indiana, or any other election to be held in said State; and enjoining your petitioner, Lew G. Ellingham, Secretary of State of the State of Indiana, and his successor and successors in office, from certifying to the clerk of each or any county in the State of Indiana not less than thirty days

before the general election to be held in the month of November 1912, or at any time, the said proposed constitution.

That thereafter your petitioners took an appeal from said judgment of the circuit court of Marion County to the Supreme Court of the State of Indiana, which court is and was the highest court of law or equity in said State in which a decision could be had in said case, and severally assigned as error in said court:—(1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court had no jurisdiction of the subject matter of the action—(4) that the court erred in stating each of his conclusions of law on the special findings; (5) that the court erred in overruling appellants' motion in arrest of judgment; (6) that the court erred in overruling the motion of Thomas R. Marshall, as Governor of the State of Indiana, in arrest of judgment.

That your petitioners alleged and contended in support of said assignment of errors that the judicial department of the State  
221 of Indiana had no power or authority to enjoin political action by the executive department, and that the said judicial department of said State had no power or authority to enjoin the Governor of said State, nor to enforce any judgment by it rendered against him in such behalf; and that said judicial department had no power or authority to interfere with legislative action taken by the general assembly to the end that the people might at a general election in a peaceable and orderly manner express themselves with regard to a matter affecting the change of the organic law of the State, and that the assertion of the powers above specified, or either of them, would be a usurpation of authority by the judicial department of said State, and repugnant to the Constitution of the United States, and particularly to Art. 4, Sec. 4 thereof, guaranteeing a republican form of government to the States of the Union.

And your petitioners further contended therein that the provisions of said Ordinance of 1787 were not germane to the questions presented for decision, and that the same were superseded by the Constitution of the United States.

That thereafter, at the May Term, 1912, of said Supreme Court of the State of Indiana, the said appeal of your petitioners came on for hearing and was argued in said Supreme Court, and on the 5th day of July, 1912, the said Supreme Court rendered its final judgment therein in all things affirming the judgment of the Marion Circuit Court as aforesaid.

222 That thereafter your petitioners filed a petition for a rehearing in said cause, as provided by the statutes of said State, which said petition for rehearing was overruled on the — day of November, 1912, and that the judgment of said Supreme Court is a final judgment in the highest court of the State of Indiana in which a decision in said cause can or could be had.

That the said judgment of the said Marion Circuit Court could not be affirmed by the said Supreme Court without deciding in favor of the validity of the authority so claimed and exercised by the judicial department of said State, and that the said Court did decide

that the judicial department of said State possesses power and authority as aforesaid.

Your petitioners further show that a Federal question was made in said case, to wit, as hereinbefore set out, and that said judgment of the said Supreme Court was repugnant to and in conflict with Section 4, Art. 4 of the Constitution of the United States, and that the said judgment of the said Supreme Court was contrary to the said Constitution of the United States; that a decision of said Federal question was necessary to the judgment rendered.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Indiana and the Judges thereof; that citation be granted and signed; that the bond herewith presented be approved, to the end that the record in said cause made may be removed into the United States Supreme Court, and the errors complained of by your petitioners may be examined and corrected.

THOMAS R. MARSHALL,

*Governor of Indiana;*

MUTER M. BACHELDER AND

CHARLES O. ROEMLER,

*Composing the State Board of Election Commissioners of the State of Indiana;*

LEW G. ELLINGHAM,

*As Secretary of State for the State of Indiana,*

By THOMAS M. HONAN,

*Att'y General;*

STUART, HAMMOND & SIMMS,

ROBY & WATSON,

*Their Attorneys.*

224

In the Supreme Court of Indiana.

No. 22064.

THOMAS R. MARSHALL, as Governor of the State of Indiana; MUTER M. Bachelder, Charles O. Roemler, Composing the State Board of Election Commissioners of the State of Indiana, and Lew G. Ellingham, as Secretary of State of the State of Indiana, Appellants,

vs.

JOHN T. DYE, Appellee.

The above entitled matter coming on to be heard upon the petition of the appellants therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Indiana, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is ordered that a writ of error be, and is hereby, allowed to this

court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is, hereby approved.

LEANDER J. MONKS,  
*Chief Justice of the Supreme Court  
of the State of Indiana.*

Filed Nov. 26, 1912. J. Fred France, Clerk.

225 [Endorsed:] No. 22064. In the Supreme Court of Indiana. Thomas R. Marshall, et al., vs. John T. Dye. Petition for Writ of Error and Bond. Filed Nov. 26, 1912. J. Fred France, Clerk. Roby & Watson, Suite 405 Board of Trade Building.

226 And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Come now the Appellants by counsel, and files a writ of error from the Supreme Court of the United States, to the said Supreme Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

227 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Thomas R. Marshall as Governor of the State of Indiana and others and John T. Dye a manifest error hath happened, to the great damage of the said Thomas R. Marshall and others as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of said District Court, this 23<sup>rd</sup> day of November, A. D. 1912.

[Seal District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,  
*Clerk of the District Court of the United  
States for the District of Indiana.*

Copy of above writ for the defendant in error lodged in the Clerk's Office of the Supreme Court of the State of Indiana of *Indiana* on the 26 day of November 1912.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this 26 day of November A. D. 1912.

J. FRED FRANCE.

*Clerk of the Supreme Court of the United States for the State of Indiana.*

[Endorsed:] No. —. District Court of the United States for the District of Indiana. Thomas R. Marshall et al. Plaintiff in Error vs. John T. Dye, Defendant in Error. Writ of Error to The Supreme Court of the United States. Filed Nov. 26 1912. J. Fred France, Clerk.

228 And on the same day the following further pleas and proceedings were had in said Court in said cause:

Come now the Appellants by counsel, and file a copy of the bond on appeal to the Supreme Court of the United States, in the penal sum of Five Hundred (\$500) Dollars, which bond is taken and approved, being hereto next below attached, and being as follows:

229 In the Supreme Court of Indiana.

THOMAS R. MARSHALL, as Governor of the State of Indiana; Muter M. Bachelder, Charles O. Roemler, Composing the State Board of Election Commissioners of the State of Indiana, and Lew G. Ellingham, as Secretary of State of the State of Indiana, Plaintiffs in Error,

vs.

JOHN T. DYE, Defendant in Error.

*Bond.*

Know all men by these presents, that we, Thomas R. Marshall, as Governor of the State of Indiana, Muter M. Bachelder, Charles O. Roemler, composing the State Board of Election Commissioners of the State of Indiana, and Lew G. Ellingham, as Secretary of State of the State of Indiana, as principals, and W. H. Vallamer as surety, are held and firmly bound unto John T. Dye, in the sum of Five Hundred Dollars (\$500), to be paid to the said obligee, his successors, representatives, and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of November, A. D., 1912.

230 Whereas the above-named plaintiffs in error hath prosecuted a writ of error in the Supreme Court of the United



States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of Indiana.

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

THOS. R. MARSHALL,  
*As Gov. of Ind.*  
W. H. VALLAMER.

I hereby approve the foregoing bond and surety this 25 day of November, A. D., 1912.

LEANDER J. MONKS,  
*Chief Justice of the Supreme Court  
of the State of Indiana.*

[Endorsed:] Marshall, et al. vs. John T. Dye. Petition for Writ of Error; Granted; Bond; Citation. Nov. 26, 1912.

231 And on the same day, the following further pleas and proceedings were had in said Court in said cause:

Come now the Appellants by counsel, and file their citation on said writ of error, duly signed by Hon. Leander J. Monks, Chief Justice of this Court, and proof of service of the citation on the attorney for the defendant in error, said citation and proof of service thereof being hereto next below attached, and being as follows:

232 UNITED STATES OF AMERICA, *vs.*

To John T. Dye, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Indiana, wherein Thomas R. Marshall, as Governor of the State of Indiana, Muter M. Bachelder, Charles O. Roemler, composing the State Board of Election Commissioners of the State of Indiana, and Lew G. Ellingham, as Secretary of State of the State of Indiana, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Leander J. Monks, Chief Justice of the Supreme Court of the State of Indiana, this 25th day of November, in the year of our Lord one thousand nine hundred and twelve.

LEANDER J. MONKS,  
*Chief Justice of the Supreme Court of  
the State of Indiana.*

Copy of the within citation received this 26 day of November, A. D., 1912.

ADDISON C. HARRIS,  
*Att'y for Def't in Error.*

233 [Endorsed:] In the Supreme Court of Indiana. Thomas R. Marshall, et al., Plaintiffs in Error, vs. John T. Dye, Defendant in Error. Citation. Filed Nov. 26, 1912. J. Fred France Clerk. Roby & Watson, Suite 405, Board of Trade Building.

234 And on the same day, the following further pleas and proceedings were had in said Court, in said cause:

Come now the Appellants by counsel, and file an Assignment of Errors in the Supreme Court of the United States, on the writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

235 In the Supreme Court of Indiana.

THOMAS R. MARSHALL, Governor of Indiana; MUTER M. BACHELDER, Charles O. Roemler, Constituting the State Board of Election Commissioners of the State of Indiana, and Lew G. Ellingham, as Secretary of State for the State of Indiana, Plaintiffs in Error,

vs.

JOHN T. DYE, Defendant in Error.

Now comes the said plaintiffs in error and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Indiana, in the above entitled matter, there is manifest error in this, to-wit:

First, That the Court erred in holding that "the underlying question involved, out of which all the others presented grow, is simply whether the Act printed as Chapter 118 is a valid exercise of legislative power by the General Assembly," when in truth and in fact the underlying question involved in said cause was whether the judicial department of the State of Indiana had power

(1) To coerce the Governor of said State by writ of injunction;

(2) To enjoin the performance of political duties by the executive department of said State.

(3) To prevent the general assembly from submitting a proposition to adopt a new constitution, to the people of the State, at a regular election in an orderly and legal manner.

(4) To prevent the people of the State from exercising their inalienable right to change, alter and reform their government except with the advice and upon the direction of the judicial department of said State.

Second, By the Constitution of Indiana, adopted in 1851, and recognized by the Congress of the United States as creating a republican form of government, it is provided that:

"The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

(Art. 3, Sec. 1.)

237 And the Supreme Court of Indiana erred in holding and deciding that the assertion of power by the judicial department of said State, in enjoining the Governor of said State from taking "care that the laws be faithfully executed," and in enjoining the executive department from the performance of purely political duties devolved upon it by the general assembly of said State, was not destructive of the republican form of government declared and guaranteed to said State by Article 4, Section 4 of the Constitution of the United States.

Third. That the said Court erred in holding and deciding that the judicial department of the State of Indiana has power to prevent the people of Indiana from exercising their indefeasible right to at all times alter and reform their government, and that it has power to enjoin the executive department of said state from submitting at a regular election, in a lawful and orderly manner, a proposition looking to the adoption of a new constitution by the people of Indiana; and that such decision and holding, and the exercise of such authority by said department, is inconsistent with the basic  
238 principles of American government, in violation of the public right, and destructive of the republican form of government heretofore adopted by the said State of Indiana in 1851, and is violative of Article 4, Section 4 of the Constitution of the United States by which a republican form of government is guaranteed to the states of the Union.

Fourth. That the said Court erred in holding and deciding that Section 1 of Article 16 of the Constitution of Indiana, adopted in 1851, in terms as follows:—

"Any amendment or amendments to this constitution may be proposed in either branch of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the general assembly to be chosen at the next general election; and if, in the general assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such amendment or amendments to the electors of the state; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution."

Furnishes the exclusive method by which changes in the organic law of the State may be made, and that said provision excludes the  
239 general assembly of said State from taking action looking to the adoption of a new constitution, and from framing, initiating or submitting fundamental law to the people for adoption or rejection in any other method, which said holding and decision is in conflict with the guarantee of the republican form of government contained in Art. 4, Sec. 4 of the Constitution of the United States.

Fifth. That said Court erred in holding and deciding that the general assembly of the State of Indiana does not exercise the sov-

ereignty of the people in determining whether a provision for the change of the constitution of said State shall be submitted to the electors of the State to be by them approved or rejected.

Sixth. That the said Court erred in holding and deciding that the general assembly of the State of Indiana does not possess power to initiate, frame or submit a proposed new constitution to the people of said State, to be by them voted upon, because of the lack of a specific enumeration of such power in the Constitution of 1851, and that the assertion of such authority by the judicial department of the State is in contravention of Sec. 4, Art. 4 of the Constitution of the United States, guaranteeing a republican form of government to the states of the Union.

210 Seventh. That the said Court erred in holding and deciding that the judicial department of the State has power and authority to determine the validity of a proposed new constitution prior to the adoption of the same, and prior to the submission of the same, to the people, to be by them adopted or rejected.

Eighth. That the said Court erred in holding and deciding that the Ordinance of 1787 in aid of the Act of Virginia, ceding the territory northwest of the River Ohio, is a part of the organic law of the State of Indiana, and a limitation upon the right of the people of said State of Indiana to adopt a new constitution.

Ninth. That the said Court erred in holding and deciding that the proposed new constitution, which the general assembly of 1911 directed should be submitted to the people at the general election in 1912 for their adoption or rejection, "is void because violative of Articles 2, 4 and 5 of the Ordinance of Congress of July 14, 1787, and Sec. 4 of the Act of Congress, approved in 1816, to enable the people of the Indiana Territory to form a Constitution and State government, and the ordinance of the people of the Territory of Indiana in convention met at Corydon and adopted June 29, 1816, securing to the people of Indiana proportionate representation of the people in the Legislature," and that said  
241 Ordinance of 1787 is a limitation upon the provisions of the Constitution of the United States as the same apply to the State of Indiana.

Tenth. The Court erred in holding and deciding that the phrase "proportionate representation of the people in the Legislature," as used in the Ordinance of 1787, is a limitation upon the provisions of the Federal Constitution, and that the meaning of said phrase is: "The people should be represented in proportion to numbers only."

Eleventh. That the said Court erred in holding and deciding that the inherent right of the people of the State of Indiana to change, alter and reform their government is restricted and limited by the provision contained in the Constitution of 1851 for amendments thereto, and that said Court in said cause, by and through the decision of the question made, presented and decided as a judicial question, undertook to compel the Executive of said State and the executive department of said State to defer to and be bound by a decision which was and is destructive of a republican govern-

242 ment in Indiana, as fixed and defined by the Constitution of 1851; and by which said decision the inherent right of the people to change, alter and reform their government is set at naught.

That said Court by its said decision undertook to, and did, invoke the presumptions which are accorded to courts having jurisdiction to decide judicial questions presented to them for decision, in order thereby to make it impossible for the executive department of the said State to maintain the integrity of such department, and to make the assertion of his lawful authority and the performance of his sworn duty by the Governor of said State to appear to be in defiance of and not according to law, and to that end the said Court did, by its opinion, declare that:—

“This is a government of laws and all are amenable to it. To the courts the people have given the power and charged them with the duty to declare what it is; and this duty can not be lightly disregarded, however unpleasant and embarrassing it may be. Without the aid of sword or purse, courts have met with little difficulty from disobedience of their decree, and this has come equally from a generally conscientious discharge of duties by the courts and a respect for the law which is inherent in our people. When the question presented to the court is a judicial question, it would be sheer inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect upon any officer of a co-ordinate department by entertaining a presumption that a law declared by the courts may be disregarded.”

243 That the said Court thereby sought to give color of authority to its assertion of the right to direct and control the executive department in the discharge of purely political functions, and to direct and control the Governor of the State in the discharge of purely executive and political duties, and to make the executive department and the Governor of said State subservient to the judicial department thereof; that the said holding and decision of said Court was and is in conflict with the Constitution of the United States, and of Article 4, Section 4 thereof, by which a republican form of government is guaranteed to the States of the Union; that the infringement of such guarantee as aforesaid is in such form and made in such manner, and accompanied by such pretense as that the United States can not make good said guarantee through or by means of either the legislature or executive arms of its government, but that the situation so created presents a judicial question which can only be adequately judicial power.

244 Twelfth. That it is provided by Section 5, Article 7, of the Constitution of Indiana, now in force, that  
“the Supreme Court shall, upon the decision of every case, give a statement in writing of every question arising in the record of such case, and the decision of the court thereon.”

That the Circuit of Marion County, Indiana, held and decided

that the proposed new constitution set out in Chapter 118. of the Acts of 1911, was in conflict with the provisions of the Ordinance of 1787, and that said ordinance limits the right of the people of Indiana to adopt a new constitution, and that the submission of said proposed new constitution to the people of the State should be enjoined because of its conflict with said Ordinance.

That the record of such case in the Supreme Court presented the correctness of said ruling of the Circuit Court to said Supreme Court for decision. That such question was properly presented upon the record of said cause, but that said Supreme Court failed and refused to give a written opinion thereon as by said section of said constitution it was required to do.

That the defendants in error contended in the Supreme Court, and that the Court by its decision held that the general assembly of said state does not have power to initiate measures looking to  
245 the adoption of a new constitution. That the plaintiffs in error contended before said Supreme Court that the general assembly of said State possessed all legislative authority not expressly withheld from it, and that a decision that it did not have power to cause the submission of the proposed new constitution set out in Chapter 118. of the Acts of 1911, would necessarily prevent the calling of a constitutional convention by said general assembly; and that the power to initiate does not depend upon the method followed in the exercise thereof. That said question arose in the record of the cause before the Supreme Court, and that said Court avoided giving, and did not give a decision and statement in writing upon said question.

That it was contended by the plaintiffs in error upon the trial of said cause before said Supreme Court of the State of Indiana that the plaintiff in error, Thomas R. Marshall, was sued by the defendant in error as the Governor of the State of Indiana, and not otherwise, and that under the constitution of said State his acts in enforcing the law providing for general elections in the State of Indiana were the acts of the Governor of said State, and that neither the general assembly of said State nor the judicial department thereof  
246 could change, or require him to act in any other capacity than that of Governor of said State.

That such question arose in the record of said cause before the Supreme Court of said State, and that the said Court avoided, and did not give a statement in writing of its decision thereon.

That there is and was no provision of the Constitution of the State of Indiana whereby the Governor of said State or the general assembly thereof could compel the Supreme Court of said State to discharge its constitutional duty, and to give a statement in writing of said questions, or either of them, arising in the record of said cause. That if such questions had been decided by the Supreme Court of said State, they would have been decided according to the contention of the plaintiffs in error, and that by such decision the co-ordinate branches of government would have had preserved to them their constitutional rights in the State of Indiana, and that had said questions, or either of them, been otherwise decided, such

decision would have been in conflict with the provision of the Constitution of the United States, guaranteeing to each state a republican form of government.

That by the decision made and the failure to include therein the propositions above stated, the general assembly, the executive department, the Governor, and the people of the State of Indiana were deprived of their constitutional rights, and that the people  
247 of said State were thereby deprived of their inherent right to change, alter and reform their government. That the failure of said Court to give a statement in writing upon each of said questions arising upon the record of said cause was intentional and for the purpose of preventing the Supreme Court of the United States from assuming jurisdiction of said cause, and for the purpose of preventing the plaintiffs in error from prosecuting an appeal to said Supreme Court of the United States, and for the purpose of placing the said general assembly of said State and the executive department and Governor thereof in such position that they could not disregard the mandate of said Supreme Court without subjecting themselves to the charge of being violators of law.

Wherefore, the plaintiffs in error pray that for the errors aforesaid, and others appearing in the record of said proceeding in the Supreme Court of the State of Indiana, to the prejudice of the plaintiffs in error, the said judgment of said Supreme Court be reversed, annulled and altogether held for naught.

THOS. M. HONAN, *Att'y Gen.*;  
DAN W. SIMMS,  
EDWIN P. HAMMOND,  
FRANK S. ROBY,  
WARD H. WATSON,  
WM. V. STUART,  
ALLISON STUART,  
ELLIS D. SALISBURY,

*Attorneys for Plaintiffs in Error.*

248 [Endorsed:] In the Supreme Court of Indiana. Thomas R Marshall, et al., Plaintiffs in Error, vs. John T. Dye, Defendant in Error. Assignment of Errors. Filed Nov. 26, 1912. J. Fred. France, Clerk. Roby & Watson, Suite 405, Board of Trade Building.

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In the Supreme Court of Indiana.

No. 22064.

THOMAS R. MARSHALL, as Governor of the State of Indiana,  
Muter M. Bachelder, Charles O. Roemer, Composing the State  
Board of Election Commissioners of the State of Indiana, and  
Lew G. Ellingham, as Secretary of State of the State of Indiana,  
Plaintiffs in Error,

vs.

JOHN T. DYE, Defendant in Error.

To the Clerk of the Supreme Court of the State of Indiana:

You are hereby directed to make and return to the writ of error in the above entitled cause, to the United States Supreme Court, a full, true and complete record of all the proceedings, orders, entries and files in said cause.

STUART, HAMMOND & SIMMS,  
ROBY & WATSON,

*Att'ys for Pl'tfs in Error.*

Copy of the foregoing received this 27th day of November 1912.

A. C. HARRIS,

*Att'y for Def't in Error.*

250 [Endorsed:] No. —. In the Supreme Court of Indiana.  
Thomas R. Marshall, et al. Plaintiffs in Error vs. John T. Dye, Defendant in Error. *Præcipe*. Filed Nov. 26 1912. J. Fred France, Clerk. Roby & Watson, Suite 405 Board of Trade Building.

251 STATE OF INDIANA,

*In the Supreme Court:*

I, J. Fred France, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the Supreme Court of Indiana, in the case of Lew G. Ellingham et. al. vs. John T. Dye, No. 22064, appealed from the Marion Circuit Court; also the original petition for the allowance of the writ of error, the original writ of error from the Supreme Court of the United States to the Supreme Court of Indiana, with the allowance thereof; the original citation to the defendant in error and proof of service thereof; a copy of the original bond and its approval by the Chief Justice of said Supreme Court, and the assignment of errors in the Supreme Court of the United States.

Which said transcript, annexed hereto, together with said original petition for the allowance of a writ of error, said original writ of error, original citation, copy of the original bond and original assignment of error, I hereby certify as and for my full return to said writ of error.



In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at the City of Indianapolis, Indiana, this 9th day of December 1912.

[Seal Supreme Court, State of Indiana.]

J. FRED FRANCE,

*Clerk Supreme Court of Indiana.*

Endorsed on cover: File No. 23,465. Indiana Supreme Court. Term No. 890. Thomas R. Marshall, as Governor of the State of Indiana, et al., plaintiffs in error, vs. John T. Dye. Filed December 19th, 1912. File No. 23,465.

Miss Laura Galt, U. S.  
FILED.

APR 25 1913

JAMES M. McKENNEY,  
SPEAKER.

IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1912.

THOMAS R. MARSHALL, *Plaintiff in Error,*  
Respondent in the Court of the  
District of Columbia.

*Plaintiff in Error,*

v.

JOHN T. DYER,  
*Defendant in Error.*

3401

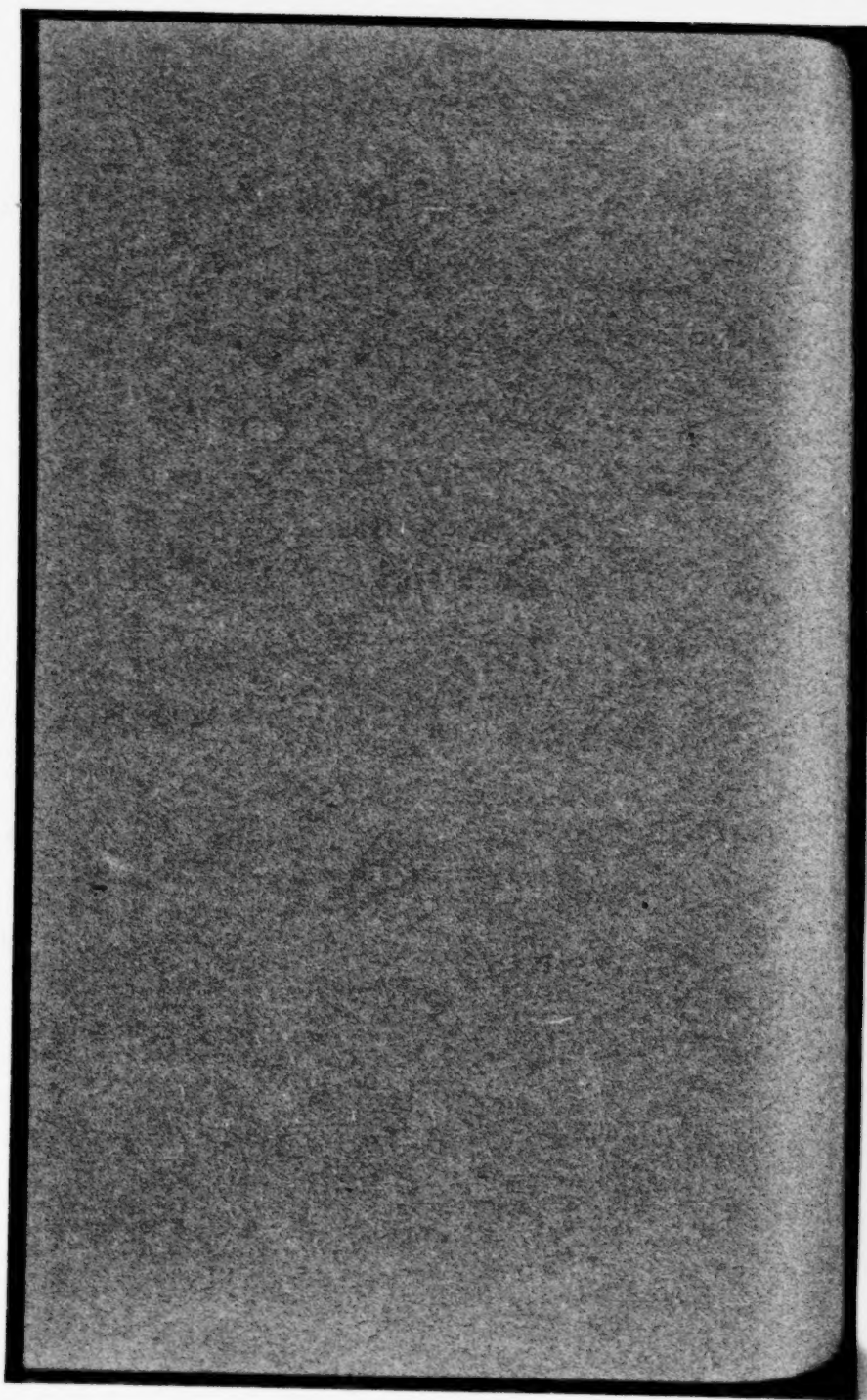
In Error to the Su-  
preme Court of  
Indiana.

WRITING TO ADVANCE

THOMAS R. MARSHALL,  
Respondent in the Court of the  
District of Columbia.

JOHN T. DYER,  
Defendant in Error.

THE U. S. SUPREME COURT, WASHINGTON.



IN THE  
Supreme Court of the United States

OCTOBER TERM, 1912.

THOMAS R. MARSHALL, AS  
GOVERNOR OF THE STATE OF IN-  
DIANA, ET AL.,

*Plaintiffs in Error,*

v.

JOHN T. DYE,

*Defendant in Error.*

No. 890.

In Error to the Su-  
preme Court of  
Indiana.

MOTION TO ADVANCE.

The General Assembly of Indiana at its 1911 session promulgated a form for a new constitution for said State, and provided for the submission thereof to the voters of the State at the general election for adoption or rejection.

The election law of said State, long in force and of unquestioned validity, provides that:

“Whenever any constitutional amendment or other question is required by law to be submitted to the popular vote, if all the electors of the State are entitled to vote on such question, the State Board of Election Commissioners shall cause a brief statement of the same to be printed on the State ballots and the words ‘yes’ and ‘no’ under the same, so that

the elector may indicate his preference by stamping at the place designated in front of either word."

§6944 Burns 1908.

The Constitution and the oath of the Governor require that "he shall take care that the laws be faithfully executed."

Art. 5, §16, Constitution of Indiana.

The statute also provides that:

"The Governor of the State and two qualified electors by him appointed, one from each of the two political parties that cast the largest number of votes in the State at the last preceding election, shall constitute a State board of election commissioners. Such appointment shall be made at least thirty days prior to each general election."

§6897 Burns 1908.

Article 3 of the Constitution of Indiana, adopted in 1851 and in force since said year, is as follows:

"The powers of the government are divided into three separate departments, the legislative, the executive, including the administrative, and the judicial; *and no person charged with official duties under one of these departments shall exercise any of the functions of another*, except as in this Constitution expressly provided."

The ~~plaintiff~~ <sup>defendant</sup> in error secured a judgment in the Circuit Court of Marion County, Indiana, enjoining the Governor of Indiana, and his co-plaintiffs in er-

ror, from performing the purely political duty of providing for the submission of the question required by the Legislature to be submitted to the people at the general election of 1912, namely: Whether said proposed new constitution should be adopted or rejected.

(1) The Supreme Court of Indiana on appeal held in effect that the courts have power to enjoin the Governor of the State from the performance of political duties imposed upon him by the General Assembly; (2) that the judicial department of the State is superior to both the executive and legislative departments thereof; (3) that the expediency of submitting political questions to the people for their approval is a matter for judicial and not for legislative determination; (4) that the people of said State cannot change, alter or reform their government without obtaining the permission of the judicial department to do so in advance, and (5) that the provision for amendment contained in the Constitution of 1851 was intended to be exclusive of other methods of constitutional change; that the power of the people to change, alter or reform their government is limited by such intention.

Thomas R. Marshall did not, as Governor of Indiana, do as he might have done—ignore the judgment of said Circuit Court and the mandate of said Supreme Court, but prosecutes this writ of error, averring that the said decree of said Supreme Court was a usurpation of power carried on under the form of a judicial proceeding which can only be adequately

dealt with by the judicial department of the national government in execution of the guaranty contained in Article 4, Section 4, of the Constitution of the United States.

In his message to the General Assembly at its 1913 session, Governor Marshall gave his reasons for obeying the mandate of the Supreme Court and for disobeying the mandate of the General Assembly of Indiana as follows:

"The last General Assembly recognizing our unfortunate condition with reference to the amendment of the State Constitution, ordered presented for adoption or rejection by the people at the election in 1912, a new constitution. An action was brought to enjoin and restrain the Governor and the other members of the State Board of Election Commissioners and the Secretary of State from putting the question of adoption or rejection upon the ballot. The litigation resulted in a permanent injunction by the Indiana Supreme Court upon a divided opinion, three members of the court being in favor of the injunction and two against it. In the majority opinion is found this language:

"There can be little doubt but that the framers of the revised constitution of 1851 believed that in Article XVI they had provided an orderly method for making all the changes in the organic law which might be necessary. \* \* \* It is manifest that they held the views relating to future changes in the organic law which influenced the Convention of Massachusetts of 1820, of which Daniel Webster was

a member and chairman of the Committee on Future Amendments, which reported in favor of the legislative mode of proposing amendments under guards and restrictions and inserted no provision for calling a convention. In explaining the reason for the action, Mr. Webster said:

“ ‘It occurred to the committee that with the experience which we had had of the constitution, there was little probability that after the amendments which should now be adopted, there would ever be occasion for great changes. No revision of its general principles would be necessary and the alterations which should be called for by a change of circumstances would be limited and specific. It was, therefore, the opinion of the committee that no provision for a revision of the whole constitution was expedient and the only question was in what manner it should be provided that particular amendments might be obtained. It was a natural course and conformable to analogy and precedent in some degree that every proposition for amendment should originate in the Legislature under certain guards and be sent out to the people.’ (Deb., Mass. Con. 1820, pp. 413, 414.)

“ ‘One thing is clearly disclosed by the review given by the proceedings of the convention on this subject and that is that it was the judgment of that body that an easy and wholly adequate method of making needed changes in the constitution had been provided. \* \* \* It is the rule that where the means by which the power granted shall be exercised



or specified, no other or different means for the exercise of such power can be implied even though considered more convenient or effective than the means given in the constitution; and the constitution gives special power to the legislature and provides the means of exercising it to effect needed changes in the organic law.'

"This last paragraph applies the doctrine that the expression of one thing is the exclusion of every other thing to a constitutional provision, though to my mind, it has no application. The maxim applies to ordinary statutes as a rule of action given by a superior to an inferior. In a constitution, a State vests its sovereign powers in three departments and then imposes by express provisions such restrictions on the exercise of these powers as may be desired.

"With utmost respect for the majority of the Supreme Court, I felt that it had usurped the functions of the legislative and executive branches of government; that the sheriff of the court would have a rather interesting time in getting possession of my body and punishing me for contempt; and that such decisions gave greater impetus to the recall of judges and decisions than all the opinions of mere laymen touching the usurpations of the courts. Yet, I realized I might be wrong.

"Though believing that it was making of the Supreme Court the only branch of government which we had, still I felt that while there was a possibility of a judicial review, I should not set myself up as a judge and resist by force of arms what to me was an

encroachment of the judiciary upon my constitutional rights. I was wholly unwilling to permit my personal views to result in anarchy. I believed that an orderly procedure with respect for the court, however little respect I might hold for its opinion, was the one for me to pursue. I felt assured that the Supreme Court of the United States would not punish me for trying to be a law-abiding citizen by refusing to decide the great questions involved in this controversy upon the theory that they were not judicial but political in their character.

"The question has now passed beyond the mere domain of party politics. The majority opinion leaves the State in doubt as to whether it can even call a constitutional convention, and as to whether our fathers did not foreclose upon posterity its right to alter and reform its system of government. It also leaves involved a far greater determination—that of the right of the court to strip the Legislature and Executive of their constitutional rights and to set itself up, not as a coördinate, but as a supreme, branch of government.

In accordance with these views, I have sued out a writ of error to the Supreme Court of the United States with confidence that that court will assume jurisdiction and decide the questions involved and with confidence that it will not dismiss the case and tell me that if I thought I was right, I should have totally disregarded the decision of the Supreme Court, defied its authority, thrown its sheriff out of my window, called out the militia to defend my po-

sition and submitted the question to the people regardless of the court."

It is important that the decision of the questions herein involved by this court be made at the earliest practicable time, for the reason that two of the leading political parties of said State have in convention declared for a new constitution, and the third of said leading parties has, as hereinbefore set out, attempted to secure the adoption of one; that the General Assembly and executive branches of said government are unable to exercise the powers delegated to them without creating an unseemly contest of authority and an appearance of anarchy; that the people themselves are prevented from peaceably and quietly exercising their inalienable right to change, alter and reform their government.

*Wherefore*, plaintiffs in error ask that the cause be set down for hearing at a convenient and early day.

Notice of this motion has been served upon counsel for the defendants in error.

THOS. M. HONAN,  
Attorney-General for Indiana.

DAN W. SIMMS,  
WARD H. WATSON,  
Attorneys for Plaintiffs in Error.

March 24, 1913.

FILED  
SEP 2 1918

SEP 2 1918

JAMES H. HANNEY,

CLERK.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

THOMAS R. MARSHALL, JR.  
Governor of the State of In-  
diana, et al.,

*Plaintiffs in Error.*

JOHN T. DYE,

*Defendant in Error.*

No. 401

(25435.)

WRIT FOR HABEAS CORPUS.

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*Of Counsel.*

Wm. S. Burtch, Clerk, Indianapolis.



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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1913.

THOMAS R. MARSHALL, AS GOVERNOR OF THE STATE OF IN- DIANA, ET AL., <i>Plaintiffs in Error,</i> v. JOHN T. DYE, <i>Defendant in Error.</i>	} No. 890. (23,465.)
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BRIEF FOR PLAINTIFFS IN ERROR.

CONCISE ABSTRACT OF THE CASE.

The defendant in error brought suit in the Circuit Court of Marion County, Indiana, against the plaintiffs in error, asking that they be enjoined from taking any steps to submit to the people of the State for adoption or rejection, a proposed new constitution, as provided in Chapter 118 of the Acts of the General Assembly of Indiana of 1911.

The issue was formed by a general denial.

Rec., p. 12 (27).

It was averred in the complaint that the

“Secretary of State is required by the statutes thereof in such case made and provided

that whenever any *proposed constitutional amendment or other question* is by law to be submitted to the people of the State for popular vote at any election to duly and within the time in the statute provided, viz., thirty days before election, certify and at the expense of the State transmit such certificate and instrument to the clerk of each county in the State (§6908 Burns 1908) for the purpose that such amendment or other question may be included in the public notice of the election required by law to be given for the same time and in the manner provided by statute in the counties and precincts in the State. *Plaintiff further says that it is provided by the statutes of this State that whenever any constitutional amendment or other question is required by law to be submitted to the popular vote of all the electors of the State at any general or other election for such purpose, the State Board of Election Commissioners shall cause to be printed and provided and distributed to the several voting precincts throughout the State a statement of such questions upon the State ballots and upon the sample ballots and in such way and manner as that every elector may indicate his preference for or against any one or more constitutional amendments, and as in favor of or objecting to any other question of fact so submitted to the popular vote of the electors of the State at such election."*

Rec., p. 2 (5).

It was also averred "that Lew G. Ellingham is the Secretary of State for the State of Indiana,"

and "that Thomas R. Marshall, *because he is Governor of the State of Indiana*, and Muter M. Bachelder and Charles O. Roemler, defendants herein, compose the State Board of Election Commissioners for the State of Indiana."

Rec., pp. 1, 2.

The cause was submitted for trial and a special finding of facts made and conclusions of law thereon stated by the court in accordance with the Indiana practice.

Rec., p. 12, paragraph 2, pp. 14-52.

The first special finding shows that the defendant in error is a resident of Marion County, Indiana, a qualified voter, and in the year 1910 paid taxes aggregating the sum of \$418.44.

Rec., p. 15, paragraph 1.

It is also found that the total expense of submitting the proposed new constitution will aggregate between \$1,000 and \$2,000.

Rec., p. 5, paragraph 11.

That the total assessed valuation of taxable property in Indiana is such that the share of the expense of submitting the proposed constitution which will be paid by the defendant in error is infinitesimal (about one mill).

Rec., p. 50 (10).



The findings set out in detail Chapter 118 of the Acts of the General Assembly of 1911.

Rec., pp. 16-45 (83).

The court stated its conclusions of law as follows:

1. That Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana is invalid and void for lack of power in said General Assembly to propose and submit the same to the electors.

Rec., p. 51, paragraph 1.

2. That said act is void because not proposed in accordance with the provisions of the present constitution of the State of Indiana, and because the General Assembly had no power to frame and submit to the electors the said proposed new constitution.

Rec., p. 51, paragraph 2.

3. "The court concludes as a matter of law that the said act of the 67th General Assembly, containing the proposed new constitution as set forth in paragraph 2 of the special findings of fact, is void, because violative of articles 2, 4 and 5, of the ordinance of Congress of July 14, 1787, and section 4 of the act of Congress, approved April 19, 1816, to enable the people of the Indiana territory to form a constitution and State government, and the ordinance of the people of the Territory of Indiana in convention met at Corydon and adopted June 29, 1816, se-

curing to the people of Indiana proportionate representation of the people in the legislature."

Rec., p. 51, paragraph 3.

4. "The court concludes as a matter of law that the proposed new constitution set forth in the said act of the 67th General Assembly, being Chapter 118, as set forth in paragraph 2 of the findings herein, is void, being in violation of the Act of Virginia conveying to the United States the territory northwest of the river Ohio, passed December 20, 1783, and providing that States formed out of said territory shall be distinct republican States when admitted members of the Federal Union; and article 5 of the Ordinance of 1787, declaring that the States created in said territory shall be republican in form; and violative of section 4 of the Act of Congress, approved April 16, 1816, to enable the people of the Indiana Territory to frame a constitution and State government, providing that the same when formed shall be republican and not repugnant to the said ordinance, which proposition from the Congress was accepted by the said ordinance of the people of Indiana in convention adopted at Corydon on June 29, 1816, accepting the proposition of the said Congress contained in said Act of April 19, 1816; and section 4 of article 4 of the Constitution of the United States, securing to every State in this Union a republican form of government."

Rec., p. 51, paragraph 4.

5. That the plaintiff is entitled to an injunction against Ellingham, enjoining him from performing the duties required to be performed by him in the statutes of the State.

Rec., p. 52 (5).

6. That Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, their successor or successors in office, should be enjoined from causing a brief statement, or any statement, of or concerning the proposed new constitution to be printed on the State ballots to be used by the electors at the election held in November, 1912, *or at any election to be held in the State of Indiana.*

Rec., p. 52 (6).

Separate exceptions were reserved to each of these conclusions of law.

Rec., p. 53 (101).

The defendants separately and severally, and the defendant Thomas R. Marshall, as Governor of the State of Indiana, thereupon filed their written motions in arrest of judgment. Identical grounds are stated in each of said motions, which grounds are as follows:

“The defendants, each separately and severally, move the court that the judgment in the above entitled cause be arrested for each of the following reasons, to wit:

First. For the reason that the court has

no jurisdiction over the subject-matter of this action.

Second.

(a) For the reason that the court has no power to enjoin or to enforce an injunction against the Governor of the State of Indiana.

(b) For the reason that 'the courts are not given a prerogative to guard the people against themselves in the matter of adopting the organic law.'

Third. For the reason that the court does not have the power, authority or right by injunction or otherwise to interfere with, control or impede the executive department in the discharge of its functions.

Fourth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be a usurpation of judicial power.

Fifth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be null and void.

Sixth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Art. 4, §4, of the Constitution of the United States, which guarantees to every State of the United States a republican form of government.

Seventh. For the reason that the court has no power, authority or right to decide political questions or to enjoin political action.

Eighth. For the reason that the court has no power to enjoin legislative action.

Ninth. For the reason that a judgment in accordance with the conclusions of law stated

would be in contravention of Art. 1, §1, of the Constitution of Indiana, providing that:

‘All power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority and instituted for their peace, safety and well-being. For the advancement of these ends, the people have, at all times an indefeasible right to alter and reform their government.’

Tenth. For the reason that a judgment herein in accordance with the conclusions of law stated would be in contravention of Art. 3, §1, of the Constitution of Indiana, by which the government of said State is divided into three separate, coordinate and independent departments.

Eleventh. For the reason that the complaint herein wholly fails to state any cause of action.

Twelfth. For the reason that the facts stated in the special finding of facts heretofore made wholly fail to establish any cause of action against the defendants.”

Rec., p. 53 (102);

Rec., pp. 54-56.

The court thereupon rendered judgment in accordance with the conclusions of law as follows:

“First. That the defendant, Lew G. Ellingham, Secretary of State for the State of Indiana, and his successor and successors in office, be and he is hereby enjoined and restrained from certifying to the clerk of each or any county in the State of Indiana not

less than thirty (30) days before *the general election to be held in the month of November, 1912, or at any time*, the said proposed constitution set forth in paragraph 2 of the special findings of fact, or any question touching the same.

Second. That the defendants, Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, composing the State Board of Election Commissioners, and their successor and successors in office, be and they are jointly and severally enjoined and restrained from causing a brief statement or any statement of or concerning the said proposed new constitution set forth in Finding 2 above herein to be printed on the State Ballot or on any ballot or ballots to be by them or any of them or their successor or successors distributed and used by the electors of the State of Indiana *at the next general election to be held in the State of Indiana, or any other election to be held in said State.*"

Rec., pp. 56, 57 (109).

An appeal was thereupon prayed and granted to the Supreme Court of Indiana.

Rec., p. 57 (110).

The assignment of errors in said Supreme Court, so far as relevant at this time, is as follows:

"Appellants in the above entitled cause each jointly and severally say that there is manifest error in the judgment and proceedings in this cause in this:

First. The complaint does not state facts sufficient to constitute a cause of action.

Second. The court has no jurisdiction of the subject-matter of the action.

\* \* \* \* \*

Fourth. The court erred in stating each of his conclusions of law on the special findings.

Fifth. The court erred in overruling appellants' motion in arrest of judgment.

Sixth. The court erred in overruling the motion of appellant, Thomas R. Marshall, as the Governor of the State of Indiana, in arrest of judgment."

Rec., pp. 59, 60 (114), (115).

An additional assignment of errors in the same form was made by Thomas R. Marshall, as Governor of the State of Indiana; (Rec., p. 60 (116)) and by each of the other defendants, and the cause was submitted.

Rec., pp. 61-63 (118).

Afterwards, on the 5th day of July, 1912, the judgment of the Marion Circuit Court was affirmed by the Supreme Court of Indiana.

Rec., p. 65 (128).

The prevailing opinion written by Cox, C. J., was concurred in by Monks and Myers, JJ.

Rec., pp. 66-113 (186).

The dissenting opinion, written by Morris, J., was concurred in by Spencer, J.

Rec., pp. 113-131 (187).

Plaintiffs in error (appellants) thereafter filed their petition and brief for a rehearing, which petition was overruled.

Rec., p. 132 (214).

Plaintiffs in error thereupon sued out a writ of error to this Court.

Rec., pp. 132-145 (215).

#### ERRORS RELIED UPON.

“1. That the court erred in holding that ‘the underlying question involved, out of which all the others presented grow, is simply whether the act printed as Chapter 118 is a valid exercise of legislative power by the General Assembly,’ when in truth and in fact the underlying question involved in said cause was whether the judicial department of the State of Indiana had power

- (1) To coerce the Governor of said State by writ of injunction;
- (2) To enjoin the performance of political duties by the executive department of said State.
- (3) To prevent the General Assembly from submitting a proposition to adopt a new constitution to the people of the State at a regular election in an orderly and legal manner.
- (4) To prevent the people of the State from exercising their inalienable right to change, alter and reform their government except with the advice and upon the direction of the judicial department of said State.



2. By the Constitution of Indiana, adopted in 1851, and recognized by the Congress of the United States as creating a republican form of government, it is provided that: 'The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided.' (Art. 3, Sec. 1.)

And the Supreme Court of Indiana erred in holding and deciding that the assertion of power by the judicial department of said State, in enjoining the Governor of said State from taking 'care that the laws be faithfully executed,' and in enjoining the executive department from the performance of purely political duties devolved upon it by the General Assembly of said State, was not destructive of the republican form of government declared and guaranteed to said State by Article 4, Section 4, of the Constitution of the United States.

3. That the said court erred in holding and deciding that the judicial department of the State of Indiana has power to prevent the people of Indiana from exercising their indefeasible right to at all times alter and reform their government, and that it has power to enjoin the executive department of said State from submitting at a regular election, in a lawful and orderly manner, a proposition looking to the adopting of a new constitution

by the people of Indiana; and that such decision and holding, and the exercise of such authority by said department, is inconsistent with the basic principles of American government, in violation of the public right, and destructive of the republican form of government heretofore adopted by the said State of Indiana in 1851, and is violative of Article 4, Section 4, of the Constitution of the United States by which a republican form of government is guaranteed to the States of the Union.

4. That the said court erred in holding and deciding that Section 1, of Article 16, of the Constitution of Indiana, adopted in 1851, in terms as follows:

'Any amendment or amendments to this constitution may be proposed in either branch of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of the State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution.'

Furnishes the exclusive method by which

changes in the organic law of the State may be made, and that said provision excludes the General Assembly of said State from taking action looking to the adoption of a new constitution, and from framing, initiating or submitting fundamental law to the people for adoption or rejection in any other method, which said holding and decision is in conflict with the guarantee of the republican form of government contained in Art. 4, Sec. 4, of the Constitution of the United States.

5. That said court erred in holding and deciding that the General Assembly of the State of Indiana does not exercise the sovereignty of the people in determining whether a provision for the change of the constitution of said State shall be submitted to the electors of the State to be by them approved or rejected.

6. That the said court erred in holding and deciding that the General Assembly of the State of Indiana does not possess power to initiate, frame or submit a proposed new constitution to the people of said State, to be by them voted upon, because of the lack of a specific enumeration of such power in the Constitution of 1851, and that the assertion of such authority by the judicial department of the State is in contravention of Sec. 4, Art. 4, of the Constitution of the United States, guaranteeing a republican form of government to the States of the Union.

7. That the said court erred in holding and deciding that the judicial department of the State has power and authority to deter-

mine the validity of a proposed new constitution prior to the adoption of the same, and prior to the submission of the same, to the people, to be by them adopted or rejected.

8. That the said court erred in holding and deciding that the Ordinance of 1787 in aid of the Act of Virginia, ceding the territory northwest of the river Ohio, is a part of the organic law of the State of Indiana, and a limitation upon the right of the people of said State of Indiana to adopt a new constitution.

9. That the said court erred in holding and deciding that the proposed new constitution, which the General Assembly of 1911 directed should be submitted to the people at the general election in 1912 for their adoption or rejection, 'is void because violative of Articles 2, 4, and 5, of the Ordinance of Congress of July 14, 1787, and Sec. 4, of the Act of Congress, approved in 1816, to enable the people of the Indiana Territory to form a constitution and State government, and the ordinance of the people of the Territory of Indiana in convention met at Corydon and adopted June 29, 1816, securing to the people of Indiana proportionate representation of the people in the Legislature,' and that said Ordinance of 1787 is a limitation upon the provisions of the Constitution of the United States as the same apply to the State of Indiana.

10. The court erred in holding and deciding that the phrase 'proportionate representation of the people in the Legislature,' as

used in the Ordinance of 1787, is a limitation upon the provisions of the Federal Constitution, and that the meaning of said phrase is: 'The people should be represented in proportion to numbers only.'

11. That the said court erred in holding and deciding that the inherent right of the people of the State of Indiana to change, alter and reform their government is restricted and limited by the provision contained in the Constitution of 1851 for amendments thereto, and that said court in said cause, by and through the decision of the question made, presented and decided as a judicial question, undertook to compel the executive of said State and the executive department of said State to defer to and be bound by a decision which was and is destructive of a republican government in Indiana, as fixed and defined by the Constitution of 1851; and by which said decision the inherent right of the people to change, alter and reform their government is set at naught.

That said court by its said decision undertook to, and did, invoke the presumptions which are accorded to courts having jurisdiction to decide judicial questions presented to them for decision, in order thereby to make it impossible for the executive department of the said State to maintain the integrity of such department and to make the assertion of his lawful authority and the performance of his sworn duty by the Governor of said State to appear to be in defiance of and not

according to law, and to that end the said court did, by its opinion, declare that:

'This is a government of laws and all are amenable to it. To the courts the people have given the power and charged them with the duty to declare what it is; and this duty can not be lightly disregarded, however unpleasant and embarrassing it may be. Without the aid of sword or purse, courts have met with little difficulty from disobedience of their decree, and this has come equally from a generally conscientious discharge of duties by the courts and a respect for the law which is inherent in our people. When the question presented to the court is a judicial question, it would be sheer inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect upon any officer of a coordinate department by entertaining a presumption that a law declared by the courts may be disregarded.'

That the said court thereby sought to give color of authority to its assertion of the right to direct and control the executive department in the discharge of purely political functions, and to direct and control the Governor of the State in the discharge of purely executive and political duties, and to make the executive department and the Governor of said State subservient to the judicial department thereof; that the said holding and decision of said court was and is in conflict

with the Constitution of the United States, and of Article 4, Section 4, thereof, by which a republican form of government is guaranteed to the States of the Union; that the infringement of such guarantee as aforesaid is in such form and made in such manner, and accompanied by such pretense as that the United States can not enforce said guarantee through or by means of either the legislative or executive arms of its government, but that the situation so created presents a judicial question which can only be adequately disposed of by judicial power.

12 That it is provided by Section 5, Article 7, of the Constitution of Indiana, now in force, that 'the Supreme Court shall, upon the decision of every case, give a statement in writing of every question arising in the record of such case, and the decision of the court thereon.'

That the Circuit Court of Marion County, Indiana, held and decided that the proposed new constitution set out in Chapter 118 of the Acts of 1911, was in conflict with the provisions of the Ordinance of 1787, and that said ordinance limits the right of the people of Indiana to adopt a new constitution, and that the submission of said proposed new constitution to the people of the State should be enjoined because of its conflict with said ordinance.

That the record of such case in the Supreme Court presented the correctness of said ruling of the Circuit Court to said Supreme Court for decision. That such ques-

tion was properly presented upon the record of said cause, but that said Supreme Court failed and refused to give a written opinion thereon as by said section of said constitution it was required to do.

That the defendants in error contended in the Supreme Court, and that the court by its decision held, that the General Assembly of said State does not have power to initiate measures looking to the adoption of a new constitution. That the plaintiffs in error contended before said Supreme Court that the General Assembly of said State possessed all legislative authority not expressly withheld from it, and that a decision that it did not have power to cause the submission of the proposed new constitution set out in Chapter 118, of the Acts of 1911, would necessarily prevent the calling of a constitutional convention by said General Assembly; and that the power to initiate does not depend upon the method followed in the exercise thereof. That said question arose in the record of the cause before the Supreme Court, and that said court avoided giving, and did not give a decision and statement in writing upon said question.

That it was contended by the plaintiffs in error upon the trial of said cause before said Supreme Court of the State of Indiana that the plaintiff in error, Thomas R. Marshall, was sued by the defendant in error as the Governor of the State of Indiana, and not otherwise, and that under the constitution of said State his acts in enforcing the law pro-



viding for general elections in the State of Indiana were the acts of the Governor of said State, and that neither the General Assembly of said State nor the judicial department thereof could change, or require him to act in any other capacity than that of Governor of said State.

That such question arose in the record of said cause before the Supreme Court of said State, and that the said court avoided, and did not give a statement in writing of its decision thereon.

That there is and was no provision of the Constitution of the State of Indiana whereby the Governor of said State or the General Assembly thereof could compel the Supreme Court of said State to discharge its constitutional duty, and to give a statement in writing of said questions, or either of them, arising in the record of said cause. That if such questions had been decided by the Supreme Court of said State, they would have been decided according to the contention of the plaintiffs in error, and that by such decision the coordinate branches of government would have had preserved to them their constitutional rights in the State of Indiana, and that had said questions, or either of them, been otherwise decided, such decision would have been in conflict with the provision of the Constitution of the United States, guaranteeing to each State a republican form of government.

That by the decision made and the failure to include therein the propositions above

stated, the General Assembly, the executive department, the Governor, and the people of the State of Indiana were deprived of their constitutional rights, and that the people of said State were thereby deprived of their inherent right to change, alter and reform their government. That the failure of said court to give a statement in writing upon each of said questions arising upon the record of said cause was intentional and for the purpose of preventing the Supreme Court of the United States from assuming jurisdiction of said cause, and for the purpose of preventing the plaintiffs in error from prosecuting an appeal to said Supreme Court of the United States, and for the purpose of placing the said General Assembly of said State and the executive department and Governor thereof in such position that they could not disregard the mandate of said Supreme Court without subjecting themselves to the charge of being violators of law."

Rec., pp. 140-145 (235), (247).

## BRIEF OF THE ARGUMENT.

The plaintiffs in error were enjoined by the Circuit Court of Marion County, Indiana, from performing certain duties which devolved upon them as officers of the executive department of said State.

Thomas R. Marshall was at the time Governor of the State. Muter M. Bachelder and Charles O. Roemler were members of the two leading political parties who had been selected by Governor Marshall thirty days prior to the general election of 1910 for the purpose of assisting him in carrying out the law providing for the holding of such election. Lew G. Ellingham was, and is, Secretary of State, of the State of Indiana.

Each and all challenged the jurisdiction of the said Circuit Court over them and over the subject-matter of the said suit, setting up specifically the guarantee contained in Article IV, Section 4, of the Constitution of the United States, and asserting that the rendition of the proposed judgment would deprive them and the State they represented of rights thereby guaranteed. The objections made are of considerable length, and appear in the record on pages 55 and 56.

The objections were renewed in the Supreme Court. (Rec., pp. 59, 60.) Two of the five judges of the Supreme Court approved the contention as appears from the dissenting opinion. (Rec., pp. 113-131.) The errors relied upon in this court continue the contention. (Rec., pp. 140-145.)

The protection of the Federal Constitution was in good faith invoked throughout the proceedings. The decision was against the rights so claimed, and this court therefore has jurisdiction herein.

Sec. 226, Judiciary Act, approved March 3, 1911.

It need not be made to appear that the judgment of the State court was erroneous in order to give this court jurisdiction. The examination to determine whether the claim is well founded involves the exercise of jurisdiction.

Chicago Life Ins. Co. v. Needles, 113  
U. S. 574;

Furman v. Nichol, 8 Wall. 44;

Andrews v. Andrews, 188 U. S. 14.

The primary question, presented to the Indiana courts is stated by Judge Morris in the dissenting opinion, in terms as follows:

“My apology for this long dissenting opinion is found in the gravity of the questions presented, and which is fully recognized by the Supreme Court of the United States and those of other States, but which is not, in my judgment, properly realized in the majority opinion.

There was a time in the history of the English people, when, by the combined usurped powers of the executive and the courts, members of parliament were cast into prison, and its constitutional authority was insulted and derided by the courts until it almost ceased

to exist. The Puritans, in despair, sought asylum in America. Macaulay Hist. Eng. Vol. 1, p. 90. The court of Star Chamber, guiltiest of all in usurping power, was abolished in 1640. 4 Black. Com. 267; Hallam Const. Hist. 258, 292. Since then no English court has deigned to dictate to Parliament what laws it should, or should not, enact.

The descendants of the Puritans took no small part in framing our early American Constitutions. In all these the independence of the legislative department was thought to be impregably guarded. Const. Indiana, Art. 4, sections 8, 9, 16. All power is inherent in the people (Const. Indiana Art. 1, sec. 1), and they alone may exercise the paramount legislative power of formulating a constitution. *State v. Thorson*, 9 S. D. 149, 33 L. R. A. 582. If the courts may dictate to the people in advance what provisions they may, or may not, insert in their constitutions they certainly can not be denied the lesser power of dictating to the General Assembly what laws it may, or may not, enact.

The plaintiff here comes into court, demanding in advance of the electors' expression of approval or disapproval, of what he claims is a series of constitutional amendments, the determination and adjudication of their future validity, if approved, and if, in the opinion of the court, there is a prospective invalidity, that the voters of Indiana be restrained from voting on the proposition, by enjoining the Governor and other officers from supplying them with ballots that are so

printed as to enable them to express their choice. This remarkable prayer was granted by the lower court, and is sanctioned by the majority opinion here. Since 1640, the courts of English speaking peoples have resolutely and invariably denied the existence of any such power, and I most earnestly protest against its revival now.

For the foregoing reasons, and for others set out in appellants' briefs, the Circuit Court had no jurisdiction of the cause of action, and the judgment should be reversed with instructions to sustain the motions in arrest of judgment.

Where the lower court has no jurisdiction of the subject-matter of the action, it is improper for this court to consider other question urged. *State v. Thorson, supra.*"

Rec., pp. 130, 131.

The plaintiffs in error submit—

(1) That the facts shown by the record present a judicial question cognizable by this court.

(2) That the judicial department of Indiana has no power to control the executive department.

(3) That it has no power to enjoin the Governor from taking care that the laws be faithfully enforced.

(4) That it has no power to override the expressed will of the legislative department.

(5) That it has no power by injunction, or otherwise, to prevent the people from expressing their

wishes with regard to a change in the fundamental law of the land.

(6) That the assertion or exercise of such power by the judicial department of said State is inconsistent with the republican form of government heretofore adopted by it.

(7) That the effect of the judgment and decision of the Indiana Supreme Court, if acquiesced in and followed, would be to vest legislative and executive power in the judicial department of said State, and to thereby institute a judicial oligarchy.

The Circuit Court had no power to control executive political action and its judgment is void.

“In a confederacy founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. \* \* \* But the authority extends no further than to a guaranty of a republican form of government which supposes a *preexisting government of the form which is to be guaranteed*. As long, therefore, as the *existing republican forms* are continued by the States, they are guaranteed by the Federal Constitution.”

The Federalist, No. 43, pp. 339, 340.

“The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these

departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

Art. 3, Sec. 1. Constitution of Indiana, adopted in 1851.

The judicial department of the government is without power to direct, coerce, or restrain the executive (in which is included the administrative) department of the government; nor may the former exercise any of the functions of the latter.

State v. Noble, 118 Ind. 350;

Butler v. State, 97 Ind. 373, 376;

Frost v. Thomas, 26 Colo. 222;

Woods v. Sheldon, Governor, 69 N. W. 602;

Sutherland v. Governor, 29 Mich. 320;

State v. Governor, 25 N. J. Law, 331, 349, 350;

State v. Lord, 28 Ore. 498, 43 Pac. 471;

Mississippi v. Johnson, 71 U. S. 475;

Georgia v. Stanton, 73 U. S. 50;

Decatur v. Paulding, 39 U. S. 497, 10 L. Ed. 559;

Ex Parte Ayres, 123 U. S. 443;

Elliott v. Wiltz, 107 U. S. 711, 27, L. Ed. 448;

2 High on Injunction, Sec. 1323.

The foregoing proposition is also supported by the authorities cited to the proposition following.



FACTS SHOWN BY THE RECORD PRESENT  
A JUDICIAL QUESTION COGNIZABLE  
BY THIS COURT.

The distinction "between judicial authority over justiciable controversies and legislative power as to purely political questions" is logically and definitely fixed by the decisions of this court. It is (1) "the legislative duty to determine the political questions involved in deciding whether a State government republican in form exists"; and (2) It is "the judicial power and ever present duty, whenever it becomes necessary in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."

Pacific States, etc., Co. v. Oregon, 223  
U. S. 118; 56 L. Ed. 377.

The plaintiffs in error, officers of the State of Indiana chosen by the people of that State to carry out for them the mandate of the law, and therefore representative of both government and people, are enjoined by a coordinate department from doing that which they are by the Constitution, the law and their oaths obligated to do. This injunction is not issued to protect any right of person or property, but as one step in a policy of aggrandizement inconsistent with a free government, and especially inconsistent with the form of republican government adopted by Indiana.

There were two methods by which these officers might defend their rights and the rights of the people whose trustees they were. The one was to ignore and treat the judgment with contempt; to repel encroachment with force. The other was to oppose in the courts by conventional process that which it was sought to invest with vitality by conventional process and the power of precedent.

The first alternative would tend to bring the government of the State into disrepute, to disturb public tranquillity, to lessen respect for the law, and therefore this writ of error has been sued out as one step in the disposition of a lawsuit to which plaintiffs in error are involuntary parties. The attack made upon them and the people represented by them is made in form of law; it is sought to meet such attack in kind, and the defendant in error can not very well deny that the issue made by him is a judicial one.

The right which the plaintiffs in error urge in this court is the right to exercise their duties under the republican form of government adopted by the State and guaranteed by the Constitution of the United States and the right of the people to require that the republican form of government adopted by them be observed. If the facts show that an attempt is being made to prevent the exercise of the rights thus guaranteed, the remedy lies in an appeal to this Court.

Pacific States, etc., Co. v. Oregon, 223 U.  
S. 118.

The number of cases involving Section 4, Article 4, of the Constitution which have come to this bar is not great, but the limit of its jurisdiction as defined in the case last cited is not open to dispute.

The case of *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627, came here on a writ of error to the Supreme Court of Missouri. The plaintiff in error, who was a woman, claimed to be a voter of the State of Missouri, notwithstanding the provision of the Constitution and the laws of the State which confined the right of suffrage to men alone, asserting among other things that a form of government which did not permit women to exercise suffrage was not republican. That question was considered by this court and held against her contention. There was no suggestion that the question was not a judicial one, and the facts involved exactly bring it within the definition of a justiciable controversy as laid down by the Chief Justice in the case of *Pacific States, etc., Co. v. Oregon*, 223 U. S. 118.

The plaintiffs in error are availing themselves of the constitutional provision contained in Article 4, Section 4, exactly as they would in a proper case avail themselves of the constitutional provision contained in Article 1, Section 10, prohibiting the passage of laws impairing the obligation of contracts.

The courts of Indiana have no jurisdiction to restrain the governor of the State.

“The executive powers of the State shall be vested in the governor. He shall hold his office during four years, and shall not be eli-

bible more than four years in any period of eight years."

"He shall take care that the laws be faithfully executed."

Art. 5, §§1, 16, Constitution of Indiana.

In *Mississippi v. Johnson*, 71 U. S. 475, 19 L. Ed. 437, the question presented to this court was stated in the opinion as follows:

"The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?"

The opinion of the court covers the point.

"An attempt on the part of the judicial department of the Government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'

\* \* \* \* \*

It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

\* \* \* \* \*

It will hardly be contended that Congress can interpose in any case, to restrain the enactment of an unconstitutional law, and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

\* \* \* \* \*

Suppose the bill filed and the injunction prayed for are allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this court to arrest proceedings in that court?"

Mississippi v. Johnson, 71 U. S. 475.

Jurisdiction is the power to hear and determine; and it includes the power to enforce the execution of what is decreed.

Hopkins v. Commonwealth, 3 Mete. 460.

All jurisdiction implies superiority of power. Authority to try would be vain and idle without authority to redress. The sentence of a court would be contemptible unless that court had power to command the execution of it.

- 1 Blackstone's Comm. p. \*242;
- Commonwealth v. Dennison, 24 How. 66;
- State v. Stone, 120 Mo. 428, 23 L. R. A. 194;
- Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564;
- State ex rel. Oliver v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712;
- People v. Morton, 156 N. Y. 136, 41 L. R. A. 23;
- People v. Bissell, 19 Ill. 229.

The courts have no power to commit the Governor for contempt. They have no power whatever over his person.

- People v. Morton, 156 N. Y. 136;
- Mississippi v. Johnson, 71 U. S. 475;
- Bates v. Taylor, 3 L. R. A. 316;
- Jonesboro v. Brown, 8 Baxt. 490, 35 Am. Rep. 713-15;
- Vicksburg v. Lowry, 61 Miss. 102, 48 Am. Rep. 76;
- In re Dennett, 32 Me. 508;
- 1 Blackstone's Comm. \*243.

Courts of the State have no power or jurisdiction over the Governor of the State to enjoin official action in any case.

Rice v. The Governor, 207 Mass. 577, 579;

People v. Morton, 156 N. Y. 136, 66 Am. St. 547;

People v. The Governor, 29 Mich. 320, 323;

People v. Bissell, 19 Ill. 229, 231, 234;

The Governor and Supreme Court, 243 Ill. 9, 35;

People v. Hatch, 33 Ill. 9, 148;

People v. Cullum, 100 Ill. 472;

State v. Stone, 120 Mo. 428, 433;

Vicksburg R. Co. v. Lowry, 61 Miss. 102, 103;

Hawkins v. The Governor, 1 Ark. 570, 572, 575;

State v. Bisbee, 17 Fla. 67, 78-83;

State v. Warmoth, 22 La. Ann. 1;

State v. Warmoth, 24 La. Ann. 351, 352;

Rice v. Austin, 19 Minn. 103, 105;

Secombe v. Kittleson, 29 Minn. 555, 561, 12 N. W. 519, 522;

Mauran v. Smith, 8 R. I. 192, 216;

In re Dennett, 32 Me. 508;

State v. The Governor, 25 N. J. L. 331, 349;

State v. Board of Inspectors, 114 Tenn. 516, 519;

Bates v. Taylor, 87 Tenn. 319, 325;

Turnpike Co. v. Brown, 8 Baxt. (Tenn.) 490, 493;

Hovey v. State, 127 Ind. 588;  
 Beal v. Ray, 17 Ind. 554, 558;  
 State v. Huston, 27 Okla. 606, 611;

When the courts attempt to interfere with action taken by the executive department, or the legislative department, as in this case, they project themselves into a field of action which belongs to another department, and violate Section 1, Article 3, of the State Constitution.

In re Opinion of Justices, 208 Mass. 610;  
 94 N. E. 852, 853.

“Hence it is,” says Blackstone, “that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary; for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn to punishment. \* \* \* If such a power were vested in any domestic tribunal, there would soon be an end to the constitution by destroying the free agency of one of the constituent parts of the sovereign legislative power.”

Blackstone’s Comm. \*243;  
 State v. Towns, 8 Ga. 360;  
 Sutherland v. Governor, 29 Mich. 320;  
 Chamberlain v. Silby, 4 Minn. 309;  
 State v. Governor, 25 N. J. Law 331.

An inferior court in Pennsylvania undertook to compel the Governor of that State to testify before its grand jury. The Supreme Court, in declaring his immunity from judicial control said:



“Observe, the supreme executive power is vested in the Governor, and he is charged with the faithful execution of the laws, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy, and militia of the State. Who then shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? For it certainly is a logical sequence that if the Governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the Court of Quarter Sessions of Allegheny County can shut him up in prison for refusing to appear before it and reveal the means and methods used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such a one may be com-

pelled to answer, to account, and to act. In other words, if, from such analogy, we once begin to shift the supreme executive power from him upon whom the constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better, at the outstart, recognize the fact that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that, with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts."

Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667;

Approved in *Hovey v. State*, 127 Ind. on p. 595.

It is averred in the complaint that "Thomas R. Marshall, *because he is Governor of the State of Indiana*, and Muter M. Bachelder and Charles O. Roemler, defendants herein, comprise the State Board of Election Commissioners for the State of Indiana."

Rec., pp. 1, 2.

It has been argued that proof of this averment conferred jurisdiction upon the Marion Circuit Court to enjoin action by Governor Marshall as a member of the board. In a recent Illinois case the right to mandate the election board of that State to perform what was alleged to be a purely ministerial act was considered. The opinion is carefully prepared and is instructive. The position assumed by the defendant in error in this case, as above stated, was also assumed by the relator in that case, and of it the court said:

“Counsel for the relators say that the duty which they sought to have performed by Gov. Deneen, and which he refused to perform, was not a duty enjoined upon him as Governor, but was a duty to be performed *because he was Governor*, and therefore it was not the performance of an executive act. To adopt that doctrine would be to locate every act of a Governor outside of the executive department, since *it is only because an individual is Governor that he can do any of the things authorized by the Constitution* and in *People v. Cullum*, supra, the writ was sought to compel the Governor to call an election, which was a duty prescribed by statute.”

People, ex. rel., v. Dunne, 101 N. E. 560.

Under the constitution, it is the duty of the Governor to “take care that the laws be faithfully executed.” And when the Governor, in pursuance of his executive authority, recognizes an act as legal,

and is proceeding to execute its provisions the courts can not interfere, by injunction, with the discharge of his duties under such act, merely because it is alleged that it is unconstitutional. For the court to enjoin the Governor, to compel him to refrain from the performance of his duties under such act, would be an usurpation of authority which alone devolves upon the executive branch of the government to exercise.

Frost v. Thomas, 26 Colo. 222, 77 Am. St. 259, 260;

Mississippi v. Johnson, 4 Wall. 475;

2 High on Injunctions (4th Ed.), Sec. 1323.

The Governor, when acting as a member of the State Board of Election Commissioners, is performing an executive duty in no other or different sense than when performing any ministerial act devolving upon him as chief executive of the State.

Huidekoper v. Hadley, 177 Fed. 1, 11.

The fact that the Legislature named the Governor as one of the State Board of Election Commissioners, and his acting in such capacity, does not denude him of his high and independent position as chief executive of the State, and the head of that department. And this is true, whether the act to be performed is ministerial, executive or political.

State, ex rel., v. Board of Inspectors, 114 Tenn. 516, 519;

People v. Morton, 156 N. Y. 136, 66 Am. St. 547, 553.

The inability of the courts to enforce their judgments against the Governor is not affected by the capacity in which he is averred to be sued, or by the character of the action. They have no jurisdiction over him, whether he be described as a citizen of the State, a member of the Board, or otherwise.

Mississippi v. Johnson, 71 U. S. 475;  
 People v. Morton, 156 N. Y. 136;  
 Hovey v. State, 127 Ind. 588, 599;  
 Work v. Corrington, 34 O. St. 64, 32 Am.  
 Rep. 345;  
 Mauran v. Smith, 8 R. I. 192, 5 Am.  
 Rep. 564;  
 Hawkins v. Governor, 1 Ark. 570, 33 Am.  
 Dec. 346;  
 State v. Kirkwood, 14 Iowa 162;  
 Woods v. Sheldon, Governor, 69 N. W.  
 602;  
 State v. Drew, 17 Fla. 67.

A willingness on the part of the Governor to conform to the decree of the court does not confer or amount to jurisdiction. Courts will not sit in the capacity of moot courts, pass upon questions, and enter judgments which they are powerless to enforce.

State v. Stone, 120 Mo. 428, 23 L. R. A.  
 194;  
 Smith v. Myers, 109 Ind. 1;  
 People v. Bissell, 19 Ill. 229, 230;  
 Bates v. Taylor, 87 Tenn. 319, 3 L. R. A.  
 316;  
 People v. Morton, 156 N. Y. 136, 41 L. R.  
 A. 23.

THE CIRCUIT COURT HAD NO POWER TO INTERFERE WITH THE EXERCISE OF LEGISLATIVE DISCRETION AND ITS JUDGMENT IS VOID.

The legislative authority in this State has the right to exercise supreme and sovereign power, subject to no restriction except that imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it. This is the power under which the Legislature passes all laws.

Beauchamp v. State, 6 Blackf. 299, 301;

Fry v. State, 63 Ind. 552, 559;

Levey v. State, 161 Ind. 251, 255;

The LaFayette, etc., Co. v. Geiger, 34 Ind. 185, 198;

State v. McClelland, 138 Ind. 321, 335, 340;

Hedderich v. State, 101 Ind. 564, 567.

“Whenever a power is not distinctly either legislative, executive, or judicial, and is not by the constitution distinctly confided to a department of the government designated, the mode of its exercise, and the agency, must necessarily be determined by law; in other words, must necessarily be under the control of the Legislature.”

Cooley, Constitutional Law, p. 44;

See. 375 Jamieson's Constitutional Conventions (4th Ed.) J. 362.

All legislative authority is vested in the General Assembly, and, as regards this authority, that body

is considered supreme and sovereign, subject to no restrictions except those which the state constitution expressly or impliedly imposes, and the restraint of the federal constitution, and the laws and treaties made pursuant thereto.

State, *ex rel.*, v. Menaugh, 151 Ind. 260, 266.

The Legislature of the State can do any legislative act that is not prohibited by the state or federal constitutions; and without and beyond the limitations and restrictions contained in those instruments the lawmaking power of the State is as absolute, omnipotent and uncontrollable as the English Parliament.

People v. Hill, 36 L. R. A. 634, 636;  
State v. Henley, 39 L. R. A. 126, 132.

The constitution has given us a list of the things which the Legislature may not do. If the courts can extend that list, they alter the instrument, become themselves the aggressors, and violate both the letter and the spirit of the organic law, as grossly as the Legislature possibly could. If the courts can add to the reserved rights of the people they can take them away. If they can mend, they can mar. If they can remove the landmarks which they find established, they can obliterate them. If they can change the constitution in any particular there is

nothing but their own will to prevent them from demolishing it entirely.

Sharpless v. Mayor, 21 Pa. St. 147, cited  
and approved in State, ex rel., v. Men-  
augh, 151 Ind. 260, 267.

Whenever a power, either legislative, executive, or judicial, is not by the constitution distinctly confined to a department of government designated, the mode of its exercise and the agents must necessarily be determined by law; in other words, must necessarily be under the control of the Legislature.

Cooley, Const. Law, 44.

Except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State except as those rights are secured by the constitutional provisions which come within the judicial cognizance. Protection against unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and patriotism of the representatives of the people.

Cooley, Const. Lim. (6th ed.), p. 200;  
Burrows v. Delta Transportation Co.,  
106 Mich. 582, 64 N. W. 501.

No restriction upon the *making* of a new constitution are imposed by the old constitution; no lim-



itation upon the methods of making a new constitution would be binding, if imposed by the old.

Indiana Constitution of 1816;  
Debates of Constitutional Convention.

The Indiana Supreme Court does not hold that the proposed new constitution is in itself unconstitutional. The holding is that the law by which its submission to the people is directed is unconstitutional, but *the complaint avers*:

“Plaintiff says that the Secretary of State is required by the statutes thereof in such case made and provided that whenever any proposed constitutional amendment, *or other question*, is by law to be submitted to the people of the State for popular vote at any election to duly and within the time in the statute provided, \* \* \*. Plaintiff further says that it is provided by the statutes of this State that whenever any constitutional amendment or other question is required by law to be submitted to the popular vote of all the electors of the state at any general or other election for such purpose, the State Board of Election Commissioners shall cause to be printed and provided and distributed to the several voting precincts throughout the State a statement of such questions upon the state ballots and upon the sample ballots and in such way and manner as that every elector may indicate his preference for or against any one or more constitutional amendments, and as in favor of

or objecting to any other question of fact so submitted to the popular vote of the electors of the state at such election."

Rec., p. 2.

And the Circuit Court found:

"That each of said named defendants, as such election commissioners, and constituting such Board of Election Commissioners, *will comply with and carry out the requirements of each and every statute of Indiana relative to the holding and conduct of said general election to be held in 1912, so far as such requirements relate to said State Board of Election Commissioners and the act and conduct as members of such State Board of Election Commissioners, and will do each and every act required to be done by them, according to law, to submit said act \* \* \** to the electors of the State of Indiana and to all the legal voters of said State for their adoption or rejection at said election."

Rec., p. 49 (92).

The statute to which reference is made both in the complaint and in the special findings is §6944 Burns 1908, and the constitutionality and validity of this statute is in no wise questioned. There is, therefore, an absolute lack of both averment and proof of anything which may serve as a pretext for the judgment rendered.

The judicial department of the government is without power to direct, coerce, or restrain the leg-

islative department of government; nor can the judicial department exercise any of the functions, or discharge, or prevent the discharge, of any of the functions of the latter.

- Sec. 1, Art. 3, Constitution of Indiana;  
 Smith v. Myers, 109 Ind. 1;  
 Langenberg v. Decker, 131 Ind. 471;  
 Wright v. Defrees, 8 Ind. 298, 303;  
 Ex Parte Griffiths, 118 Ind. 83-85;  
 Carr v. The State, 127 Ind. 204, 208;  
 State, ex rel., Hovey v. Noble, 118 Ind.  
 350;  
 Ex Parte France, 176 Ind. 72;  
 Hanly v. Sims, 175 Ind. 345;  
 State, ex rel., v. Haworth, 122 Ind. 462;  
 McComas v. Krug, 81 Ind. 327;  
 Wilson v. Jenkins, 72 N. C. 5;  
 Goddin v. Crump, 8 Leigh, 154;  
 Burch v. Earhart, 7 Ore. 58;  
 Franklin v. State Board, etc., 23 Cal.  
 177;  
 People v. Pecheco, 27 Cal. 175;  
 Cherokee Nation v. Georgia, 5 Peters, 1;  
 Georgia v. Stanton, 73 U. S. 50;  
 Decatur v. Paulding, 39 U. S. 497;  
 Alpers v. San Francisco, 32 Fed. 503, 24  
 Am. Rep. 756;  
 New Orleans Water Co. v. City of New  
 Orleans, 164 U. S. 471, 41 L. Ed. 518;  
 State v. Lord, 28 Or. 498, 31 L. R. A.  
 473, 479;  
 McChord v. Louisville, etc., R. Co., 163  
 U. S. 483, 46 L. Ed. 289.

The holding of an election is the exercise of a political right exclusively within the domain of legislative direction, and a court of equity is without jurisdiction to interfere or restrain.

- 1 Pomeroy, Eq. Rem., §§324, 331, 332;
- Winnette v. Adams, 99 N. W. 681;
- People v. Barrett, 203 Ill. 99, 67 N. E. 742;
- Dickey v. Reed, 78 Ill. 261;
- Anthony v. Burrow, 129 Fed. 783;
- Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721;
- Green v. Mills, 69 Fed. 852;
- Fletcher v. Tuttle, 151 Ill. 41;
- Roudanez v. City of New Orleans, 29 La. Ann. 271, 273;
- Landes v. Walls, 160 Ind. 216, 218;
- People v. Galesburg, 48 Ill. 485;
- Harris v. Shryock, 82 Ill. 119;
- Smith v. McCarthy, 56 Pa. St. 359;
- Holmes v. Oldham, 1 Hughes 76;
- Weil v. Calhoun, 25 Fed. 865;
- Walton v. Develing, 61 Ill. 201;
- Darst v. People, 62 Ill. 306;
- Parker v. State, ex rel., 133 Ind. 178;
- Des Moines Gas Co. v. City of Des Moines, 44 Iowa 505.

“It [the judiciary] has a great and state-ly jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker.”

“Under no system can the power of courts

go far to save a people from ruin; our chief protection lies elsewhere."

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that. What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them—the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every state, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the Legislature—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coordinate depart-

ment of the government, charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

“To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function of its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation.”

Thayer, *Legal Essays*, 22.

The JUDICIAL department of the State has no power to ENJOIN THE PEOPLE of the State from expressing their wishes in a PEACEFUL and orderly manner with regard to a change in THE FUNDAMENTAL LAW. The basic principle upon which American institutions are founded is stated in the following extract from the Constitution of Indiana:

“We declare that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of

happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and wellbeing. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."

Art. 1, Section 1, Constitution of Indiana.

The right of the people declared in the foregoing section is not made dependent upon the consent of the judicial department of the State's being first obtained.

The plaintiffs in error were enjoined from carry-out the provisions of the valid and unquestioned statute.

"Whenever any constitutional admendment, *or other question*, is required by law to be submitted to popular vote \* \* \* the State Board of Election Commissioners shall cause a brief statement of the same to be printed on the state ballots and the words 'yes' and 'no' under the same, so that the elector may indicate his preference by stamping at the place designated in front of either word."

§6944 Burns 1908.

The injunction in this case is not only against the officers, but against the electors as well.

Walton v. Develing, 61 Ill. 201.

What can not be done directly can not be done by indirection.

In voting upon questions relating to the adoption of fundamental law, the voter exercises a legislative function and constitutes a part of the legislative branch of the government.

People v. Mills, 70 Pac. 327;

State v. Thorson, 68 N. W. 202.

When the General Assembly passes an act submitting a question to the electorate for final determination, the act is upon its passage, and is *in fieri* until it is voted upon and the result duly declared.

People v. Mills, 30 Colo. 262;

State v. Thorson, 9 S. D. 149;

Art. 3, Constitution of Indiana;

Walton v. Develing, 61 Ill. 201;

State, ex rel., v. Winnette, 78 Neb. 379,  
110 N. W. 1113;

Brashear v. City of Madison, 142 Ind.  
685, 691;

Threadgill v. Cross, 26 Okla. 403, 109  
Pac. 558.

The making of a constitution, the enactment of organic law, the framing and establishment of the structure and mechanism of government, is legislation of the highest character. The General Assembly alone can initiate, propose and submit such legislation to the highest tribunal known to civil government—the people.



*Brashear v. City of Madison*, 142 Ind. 685, 691;

*Eakin v. Raub*, 12 Serg. & R., 330, 347;

*Sage v. The Mayor*, 15 N. Y. 61, 62.

The people, in their sovereign capacity in taking initiative steps in proposing or adopting a constitution, or constitutional amendments, do not act in their collective capacity, but the sovereignty of the people is exercised through their representatives in the Legislature, unless the power is elsewhere reposed. What is required in such case to be done is required of the legislative power under the constitution as it exists.

*McPherson v. Blacker*, 146 U. S. 1, 25

No change can be made in a constitution except by the combined action of both the Legislature and the people. The Legislature takes the initiative in all cases.

*State, ex rel., v. Dahl*, 6 N. Dak. 81, 34 L. R. A. 97, 98;

*Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641, 644;

*Commonwealth v. Griest*, 196 Pa. St. 396, 50 L. R. A. 568, 573.

The sovereignty of the people, speaking through its representatives, the Legislature, is the final judge, whether the sense of the people on a grave issue shall be taken at the polls.

*State, ex rel., v. Dahl*, 6 N. Dak. 81, 34 L. R. A. 97, 98.

The people are the source of power. It is they who make and abrogate written constitutions. No executive or court has the right to step between the people's representatives and say that, without his or its approval, the people shall not be permitted to express their views on propositions to change the organic law.

Warfield v. Vandiver, 101 Md. 78, 115;  
 Green v. Weller, 32 Miss. 650, 684;  
 Commonwealth v. Griest, 196 Pa. St. 396,  
 50 L. R. A. 568, 571;  
 In re Senate File 31, 25 Neb. 864, 872;  
 Hollingsworth v. Virginia, 3 Dall. 378;  
 State v. Dahl, 6 N. Dak. 81, 34 L. R. A.  
 97, 98.

"The power of the General Assembly can not be distinguished from the power of a convention upon questions of submitting changes in the constitution to a popular vote."

Trustees v. McIver, 72 N. C. 76, 85.

When a body has the power of delegating authority, it has itself the power of doing the thing delegated. It may perform any act it can authorize another to do, on the principle that the less is included in the greater.

Trustees v. McIver, 72 N. C. 76, 84;  
 Rice v. Parkham, 16 Mass. 326, 331;  
 Cooley, Constitutional Limitations  
 (1868 Ed.), p. 100.

There is nothing in the provision for submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government; because the measure derives all its vital force from the action of the people at the ballot-box, and there never can be any danger in submitting to a free people the proposition, whether they will change their fundamental law.

*Green v. Weller*, 32 Miss. 650, 684.

The court erred in holding and deciding that the courts of the State have the power and authority to determine the validity of a proposed new constitution, or constitutional amendments, or the proposed submission of such constitution or amendment, prior to the time the same has been submitted to the vote of the people.

*State, ex rel., v. Thorson*, 9 S. Dak. 149,  
33 L. R. A. 582;

*Threadgill v. Cross*, 26 Okla. 403, 414,  
138 Am. St. 962, 973;

*People v. Mills*, 30 Colo. 262.

Courts pass the line of judicial authority when, by any order or in any mode, they assume to control the discretion with which the sovereign people or municipal assemblies are vested, when the people or such municipal assemblies are deliberating on the adoption or the rejection of a constitution, or constitutional amendments, by the people, or by an ordinance of the municipal assembly, which may be

proposed for adoption. The adoption or the rejection of a constitution, or of a constitutional amendment, by the people, and the passage of ordinances by municipal assemblies, are legislative acts, which a court of equity can not enjoin.

New Orleans, etc., Co. v. New Orleans,  
164 U. S. 458, 481;

State, ex rel., v. Thorson, 9 S. Dak. 149,  
33 L. R. A. 582;

Threadgill v. Cross, 26 Okla. 403, 413;

People v. Mills, 30 Colo. 262.

The power and jurisdiction, assumed by the court in this case, to declare the proposed constitution ineffectual, and to arrest its submission to the people, wrests from the people the expressly reserved power of the people at all times "to alter and reform their government."

Edwards v. Lesueur, 132 Mo. 412, 31 L.  
R. A. 815, 819.

## NO INVASION OF CIVIL RIGHT IS AVERRED OR SHOWN.

A civil right is a right accorded to every member of the State, while a political right is a right exercised in the administration of government and consists in the power to participate directly or indirectly in the establishment or *management of government*.

Fletcher v. Tuttle, 151 Ill. 41;

Giles v. Harris, 189 U. S. 475;

People v. Barrett, 203 Ill. 299, 96 Am. St. Rep., 296;

People v. Morgan, 90 Ill. 558-563;

People v. Washington, 36 Cal. 658, 662.

“In order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power. The rights in danger, as we have seen, *must be rights of persons or property*, not merely political rights which do not belong to the jurisdiction of the court either in law or in equity.”

Georgia v. Stanton, 6 Wall. 50; 18 L. Ed. 721;

Mississippi v. Stanton, 154 U. S. 554;

Green v. Mills, 69 Fed. 858; 30 L. R. A. 94;

Carr v. State, 127 Ind. 208.

The purpose of this suit was to prevent the people from voting on the proposition which it was proposed to submit to them. If there is any one

act which is purely political, it is the exercise of the right of suffrage. The suit takes quality from that which it seeks to accomplish. The proposed constitution contains certain provisions which did not please Mr. Dye. He sought to keep them from being incorporated into the fundamental law of the State, not by an appeal to the judgment of the electors, but by invoking judicial process to prevent the electors from expressing their judgment. The injunction accomplished exactly what a negative vote upon the question proposed would have accomplished.

The complainant describes himself in his complaint as follows :

“Plaintiff says he is a male citizen of the United States and over the age of twenty-one years, and has resided in the State of Indiana more than forty years continuously next before this date; and that he now resides, and for many years has resided, and will continue to reside in Washington Township, in Marion County, in the State of Indiana. That he has been during all the time of his citizenship in the State of Indiana, and now is, a taxpayer in said county and an elector, and will be entitled to vote in said township and county at the next general election to be held on the first Tuesday after the first Monday in November, 1912. And plaintiff brings this suit for himself and also for all the electors and for the taxpayers in the State of Indiana.”

Rec., p. 2 (4).

“And plaintiff states that he brings this action for the benefit of himself as a citizen, elector and taxpayer in the State of Indiana, and also on behalf and for the benefit of all the other citizens, electors and taxpayers in the State.”

Rec., p. 9.

He brought the suit as a citizen for the benefit of himself and all other citizens; as an elector and taxpayer for the benefit of himself and all other electors and taxpayers. The office of the courts is to decide litigated cases, protecting rights of person and property. They have no authority to entertain litigation by citizens as such. They have no authority to entertain litigation by electors as such. The fact that an elector is also a taxpayer gives him no better standing as a litigant than an elector who is not a taxpayer, and so it appears upon the face of the proceedings that it is nothing except an attempt to control political action which the Governor and his subordinates were about to take in accordance with legislative direction.

There is a class of cases (of which this is not one) in which equity will interpose at the suit of a taxpayer to prevent the imposition of a tax or an assessment which by law is made a lien upon his property, and such remedy is extended in a somewhat arbitrary fashion to prevent the imposition of illegal burdens which will necessarily be discharged by taxation.

Pomeroy, *Equity Jurisprudence* (2d ed.), §§260, 270.

The invasion of property right necessary to jurisdiction being thus established, and the remedy at law being less efficient, equity interferes, and in order to prevent a multiplicity of actions, the suit may be maintained jointly or by one taxpayer suing for himself and all others in his class.

In order to entitle a litigant to the benefit of this doctrine he must bring himself within its terms. The suit must really be one for the protection of a personal or property right. A complainant who sues as an elector to enjoin political action cannot give himself standing through the mere subterfuge of averring that he is also a taxpayer, and will therefore be damaged. (The finding shows the possible cost to him to be about a mill.) Such an averment is not even colorable and forms no basis for the exercise of equitable jurisdiction.

The cost of the proposed submission which would fall upon the plaintiff is too trifling, fanciful and speculative to establish irreparable injury to property rights.

1 Pomeroy, Eq. Rem., §331;  
 State v. Thorson, 9 S. D. 149;  
 1 High on Injunction, §22;;  
 State v. Lord, 28 Or. 498.

Courts of equity regard substance. The substance of the plaintiff's claim is not even clouded by the pretext used. "Resist the beginnings", is the maxim of a free people. No nation can remain free if its people are willing to wait until the govern-



ment has been subverted before coming to its defense.

The effect of precedent is most patent. An encroachment made under form of judicial decision is infinitely more dangerous than encroachment in any other possible way.

The judicial department of the State of Indiana by the judgment in question has claimed for itself powers vested by the constitution of the state in the executive and legislative departments of the state and authority which has never been surrendered by the people. The effect of its decision is to declare a judicial oligarchy in form of law, but in defiance of law. The Governor of the State must secure and take direction from the Supreme Court before proceeding to the discharge of his constitutional duty. The right of the people to change, alter and reform their government is qualified by the necessity of securing the previous assent of the judicial department thereto, and the function of discharging purely political duties from which the judicial department is by the Constitution expressly excluded is taken over by it.

Under this decision a circuit court can confer more authority upon its bailiff than the Constitution has conferred upon both legislative and executive departments.

## WHAT THE DECISION OF THE INDIANA SUPREME COURT MEANS.

A republican form of government might perhaps have been designed and adopted without providing for a division of power. It may be that a form could have been devised vesting supreme authority in an executive body of five men, but nothing of the kind was done or attempted.

The guaranty contained in Article IV, Section 4, of the Constitution of the United States "supposes a preexisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the Federal Constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so and to claim the Federal guaranty for the latter."

*The Federalist*, No. 43, p. 342.

It may be said not unreasonably, that "the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible States."

*Texas v. White*, 7 Wall. 700.

The encroachment upon the republican form of government under which Indiana holds its place in

the Union is an insidious one made under claim of duty. In the name of the law "doctrines are proclaimed which put the court over and above the law."

The majority opinion contains the following:

"This is a government of laws and all are amenable to it. To the courts the people have given the power, and charged them with the duty to declare what it is; and this duty cannot be lightly disregarded however unpleasant and embarrassing it may be. Without the aid of sword or purse courts have met with little difficulty from disobedience of their decree and this has come equally from a generally conscientious discharge of duty by the courts and a respect for the law which is inherent in our people. Where the question presented to a court is a judicial question it would be sheer, inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect on any officer of a coordinate department by entertaining the assumption that the law as declared by the courts might be disregarded."

Rec., p. 109 (181).

Over and against this we put the language used by one of the great judges of this court, who regarded the fundamental doctrines of liberty and

helped to weave them into the Constitution of the United States.

“Let us suppose a union of the executive and judicial powers: this union might soon be an overbalance for the legislative authority; or, if that expression is too strong, it might certainly prevent or destroy the proper and legitimate influences of that authority. The laws might be eluded or perverted; and the execution of them might become, in the hands of the magistrate or his minions, an engine of tyranny and injustice. Where and how is redress to be obtained? From the Legislature? They make new laws to correct the mischief: but these new laws are to be executed by the same persons, and will be executed in the same manner as the former. Will redress be found in the courts of justice? In those courts, the very persons who were guilty of the oppression in their administration, sit as judges, to give a sanction to that oppression by their decrees. Nothing is more to be dreaded than maxims of laws and reasons of state blended together by judicial authority. Among all the terrible instruments of arbitrary power, decisions of courts, whetted and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds.”

Wilson's Works, Vol. 1, p. 366.

The executive could have disregarded the mandate of the Supreme Court in this case, but he could

not adequately repel the attack made upon the republican government of Indiana under form of judicial decision.

Authority to direct its coordinate departments in their own spheres has been declared in the name of the law by the highest court of the State and a record made which, unrevoked, stands as warrant therefor, a record that will gain authority by the lapse of time and the calm assumption of a veto power over the people of the State desiring to change, alter and reform their government, makes a most dangerous precedent and one which ought not to stand.

If we have shown that the judgment of the State court was beyond its power, those parts of the opinion which do not have to do with that question are immaterial for the reason, as stated by Morris, J., "when the lower court has no jurisdiction of the subject-matter of the action, it is improper for this court to consider other questions urged."

Rec., p. 131.

And by Elliott, J., in *Smith v. Myers*, 109 Ind. 1, 9, as follows:

"It is a rudimentary principle, acted upon again and again, that when it is ascertained that there is no jurisdiction, courts will go no further. It would not only be a vain and fruitless thing to assume to decide a question when there is no jurisdiction, but it would

be a mischievous thing, because it would give an appearance of authority to that which is utterly destitute of force. Such a decision would be the merest shadow of authority, binding nobody."

This consideration operates to excuse discussion here of propositions enunciated in the opinion other than those addressed to the question of power, and the lack of such discussion will not, we hope, be understood as in any wise implying assent to those phases of the opinion.

## A CITIZEN OF THE UNITED STATES.

### I.

In the view of this appeal which is bound to be taken by the defendant in error, there would indeed be occasion for examining the announcement of the propositions in the opinion of the Indiana Supreme Court relative to the adoption and change of fundamental law.

Plaintiffs in error are citizens of the United States as well as citizens and officers of the State of Indiana. They are here representing the citizenship of the State of Indiana by virtue of authority conferred upon them to do so in a conventional and regular manner. If the decision of the Indiana Supreme Court is expressive of the law of Indiana, the inquiry arises as to whether such law abridges the privileges and immunities of these citizens of the United States.

One privilege conferred upon a citizen of the United States is to live under a republican form of government. (Art. 4, Section 4.) The benefit of the writ of habeas corpus is another privilege belonging to him. (Art. 1, Sec. 9.) To peaceably assemble and petition for redress of grievances is another. (First Amendment.) And there are many others which have been, and others still, which will be, judicially declared as occasion arises.

Slaughter-House Cases, 16 Wallace 36;  
Crandall v. State of Nevada, 6 Wallace  
36.

It is the right of the people in a government, republican in form, to peaceably "alter or abolish it and to institute a new government, laying its foundation on such principles and organizing its powers in such form as *to them* shall seem most likely to effect their safety and happiness." (Declaration of Independence.)

"We declare that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."

Art. 1, Sec. 1, Constitution of Indiana.

The assertion of this inherent right by the people as against a monarchical government was by force of arms. When the citizens of a State in the Union propose to alter and reform the government of such State, they have assurance from the Constitution of the United States that as citizens of the United States such change may be accomplished by peaceable and orderly methods.

The opinion of the Indiana Supreme Court declares that a provision inserted in the present Constitution of that State, providing a method by which amendments thereto might be made, excluded subsequent generations not only from otherwise amending that instrument, but from formulating or adopting a new constitution.

Rec., p. 80, last paragraph, to p. 87;  
Rec., p. 141.

It applies to the existing constitution the rule of construction that "where the means by which a *power granted* shall be exercised are specified, no other or different means for the exercise of the power can be implied, even though considered more convenient or effective than the means given in the Constitution."

Rec., p. 92 (160).

This rule, applicable to legislative acts, has no possible application to a constitution. That it is thus invoked most vividly illustrates the point that under this opinion an inalienable right, belonging to



citizens of the United States, is denied them by the law of the State of Indiana, if this be the law.

The people of Indiana may make and unmake constitutions because the right to do so is a natural, inherent one, secured to them by the Constitution of the United States; not because power to do so was granted to them by the framers of the Constitution of 1851. Such power could not be thus given, for it already was. It could not be taken away from subsequent generations, for the hour that a child is born, it is his.

If the view of the defendant in error be allowed and the authority of the Supreme Court to decide be granted, and if the opinion holds as it says, then we assert that citizens of the United States and of Indiana are deprived of the inherent right to change, alter and reform their government as seems to them best calculated to effect their safety and happiness, and that the remedy for such deprivation of right lies in an appeal to this court.

## II.

If the existence of power in the Indiana court to decide be assumed, and if it be not admitted that the decision in question denies the right to change fundamental law in that State in any other manner than as specified by Section 1 of Article 16 of the Constitution of Indiana, yet the opinion still withholds from the citizens of that State privileges ("rights" is a more suitable term) guaranteed to

citizens of the United States by the Constitution of the United States.

The opinion in question contains much which seems to have been intended as a vindication of Chief Justice Marshall and the decision in *Marbury v. Madison*, and a defense of the judicial function in the exercise of which unconstitutional laws are declared void.

Rec., pp. 96-99.

If Thomas Jefferson were living, it is not likely that he would at this day controvert the present state of the law upon that subject. Neither is it believed that Chief Justice Marshall would agree that the people of Indiana can only adopt a new constitution when the Supreme Court of that State, in its divided wisdom, shall have first approved both the subject-matter of the instrument and the means adopted to formulate and submit it. Constitutions derive their life from the people. Historically, it is true that it has not mattered who the draftsman was, what paper or what pen he used, so that in orderly procedure the question of adoption has been duly submitted and fairly answered.

It is said in the opinion, referring to some of the illustrations of this historical fact, that they are "obviously distinguishable."

Rec., p. 91 (159).

Does "obviously distinguishable" mean that the people of Indiana do not have the same inherent

right to vote upon the adoption of a new constitution, in accordance with the legislative authority and under executive direction, that the people of Nebraska, or any other State of the Union, have or had?

The right of the people of Indiana to adopt such a constitution as it suits them to adopt is by the opinion in question qualified so that they may now make such constitution upon the condition precedent that it may suit or please the ninety-two circuit courts and possibly the Supreme Court of the State to have them so do.

What may suit or please the judicial department of the State government is entirely immaterial. Usually, changes in government are made because of abuse in government. Must the consent of those who are to be reformed be obtained before reformation may even be considered? Such a qualification upon the right of a citizen of the United States to mould the republican form of government as seems best to him is inconsistent with American institutions.

In the trial court the defendant in error proceeded upon the following hypothesis:

“Why submit a void proposal to the people and incur the trouble and expense in connection therewith? Reason would seem to dictate that when a new constitution is proposed \* \* \* in defiance of the constitutional command, \* \* \* that the judicial department could be invoked to inquire into and

determine such validity, and thereby save the submission of a void constitution \* \* \* to the people and the trouble and expense in connection therewith."

(Extract from opinion of the Judge of the Marion Circuit Court.)

When the cause came on for hearing in the Supreme Court, it was urged by the learned counsel for the defendant in error that an injunction was necessary because if the question which it was proposed to submit to the people was submitted to them and answered affirmatively, it would thereafter be impossible to obtain any relief, for the reason that such new constitution would thereafter be the constitution of the State, binding upon officers holding under it.

We respectfully request that the learned counsel for the defendant in error state the view now held by him upon this subject.

It is lawful for the people of Indiana to adopt a new constitution. If the adoption of the proposed new constitution by the electors will make it the constitution of the State, then the judgment of the court operates to prevent the accomplishment of a lawful act. It prevents the performances of an act of extraordinary legislation by those alone who can perform it, upon the possible ground that the method followed is not in accordance with the procedure which the court regards as regular, although the course to be followed is a matter for the legislative

body alone. To prevent the citizens of the State from exercising the power which has not been by them delegated to some department of government is an unwarranted interference with the privileges of American citizenship. This court has not failed at any time to protect delegated rights and to secure the benefit of such rights to those who are entitled thereto. The protection of reserved rights and of the greater body of people by whom and to whom they have been and are reserved is a matter not only of equal, but of greater concern. That the reserved rights of the people shall be held inviolate and that the exercise of such rights be unimpeded is essential to the maintenance of public institutions and the continuance of free government in America.

#### THE ORDINANCE OF 1787.

The Circuit Court also held that the Ordinance of 1787 and Section 4 of the Act of Congress approved April 19, 1816, to enable the people of Indiana Territory to form a constitution and State government, is in itself an instrument limiting the power of the government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of the States to be carved out of that Territory, and that it is still in full force and effect.

Rec., p. 51, 3d and 4th Conclusions of Law.

Section 5, Article 7, of the Constitution of Indiana, now in force, declares that "the Supreme Court shall, upon the decision of every case, give a statement in writing of every question arising in the record of such case, and the decision of the court thereon.

The Circuit Court held that the proposed new constitution was in conflict with the provisions of the Ordinance of 1787; that said ordinance limits the right of the people of Indiana to adopt a new constitution, and that the submission of said proposed new constitution to the people of the State should be enjoined because of its conflict with such ordinance.

The correctness of this holding was challenged by the plaintiffs in error, and the record presented the correctness of such ruling of the Circuit Court to the Supreme Court. The matter was argued both in the briefs and orally. The Supreme Court violated the Constitution of Indiana, and made no statement in its opinion relative to this matter.

The contention of the plaintiffs in error here is that the affirmance of the judgment, *ipso facto*, affirmed the conclusions of law upon which the judgment was based, and that the Supreme Court of Indiana can not by disregarding its constitutional duty as aforesaid deprive this court of jurisdiction over the Federal question. It could have followed the decisions of this court and declared that said ordinance was not now effective. It refused to do so, and by such refusal impliedly announced that it ap-

proved of the contrary doctrine declared by the Judge of the Marion Circuit Court. The true doctrine seems not to be open.

"But the Ordinance of 1787, as an instrument limiting the powers of government of the Northwest territory, and declaratory of certain fundamental principles which must find place in the organic law of States to be carved out of that territory, ceased to be, in itself, obligatory upon such States from and after their admission into the Union as States, except in so far as adopted by such States and made a part of the law thereof. This has been the view of this court, so often announced as to need no further argument."

*Cincinnati v. Louisville, etc., R. Co.*, 223  
U. S. 390. (Citing cases.)

IT WILL BE THE DUTY OF THE EXECUTIVE OFFICERS TO SUBMIT THE PROPOSED QUESTION AT THE NEXT GENERAL ELECTION AFTER THE JUDGMENT ENJOINING THEM HAS BEEN REVERSED.

The plaintiffs in error are enjoined and restrained from causing a brief statement or any statement concerning said proposed new constitution to be printed on the State ballots "at the next general election to be held in the State of Indiana, or at any other election to be held in said State."

Rec., p. 57 (109).

The fact that the general election of 1912 has been held does not affect the question presented to this court.

“Where a thing is to be done on or before a certain date, if a literal compliance as to the date becomes impossible without fault of the power which created the duty, the thing may be done or the act performed as soon as it becomes possible to be done after the time fixed has passed.”

Commonwealth, ex rel., Elkins, v. Greist,  
196 Pa. St. 396; 50 L. R. A. 563.

The provision as to time is directory where strict compliance with the time limit is not essential.

“It has often been held, for instance, where an act ordering a thing to be done by a public body or public officers, and pointing out the specific time when it was to be done, that the act was directory only and might be complied with after the prescribed time. Such is, indeed, the general rule unless the time specified is of the essence of the thing or the statute shows it was intended as a limitation of power, authority or right.”

Commonwealth v. Greist, *supra*.

There being no method prescribed by the Constitution of Indiana for the making of a new constitution, the right to initiate action in regard thereto was unquestionably reserved in the people, and the usual and ordinary method of giving expression



thereto was through the Legislature. The court had no more right to strike down a proper statute submitting a proposed new constitution to the electorate than it had to enjoin the use of the elective franchise. There is no exclusive way in which a new constitution shall be framed and submitted. In fact submission to the electorate has not been regarded a necessity as the adoption of the Indiana Constitution of 1816 shows. The federal guaranty of a republican form of government is a political right not within the domain of the judiciary. It is as much of an encroachment for the judiciary to veto the exercise of such right as it would be for the legislature to abolish the court. In either case it logically ends at nothing short of destruction to the government.

The courts do not, as the Indiana Supreme Court assumes, have jurisdiction to determine the quality of political action. Whether the proposed constitution was wise, or unwise, whether it, if adopted, would have infringed upon the defendant in error's privileges, were questions purely political which the people had a right to determine, without the exercise of any benevolent guardianship by either the executive or the judicial departments. The unwarranted obstruction of this judgment to the maintenance of a republican form of government can be removed only by this court which ever guards the integrity of the Federal Constitution. And though this court has not jurisdiction over the subject-mat-

ter of such political action, it nevertheless has the power to set aside erroneous orders of lower courts which obstruct the exercise of purely political rights. Especially is this true where the right sought to be exercised and which is obstructed, is one springing from the fountain of liberty—from the people themselves in their quest to reform their defective fundamental law.

We respectfully submit that the judgment of the Indiana Supreme Court ought to be reversed and the petition of the defendant in error dismissed for want of jurisdiction.

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U. S. Supreme Court, D. C.  
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JAMES E. McKENNEY,  
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IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1913.

THOMAS R. MARSHALL ET AL.,  
*Plaintiffs in Error,*

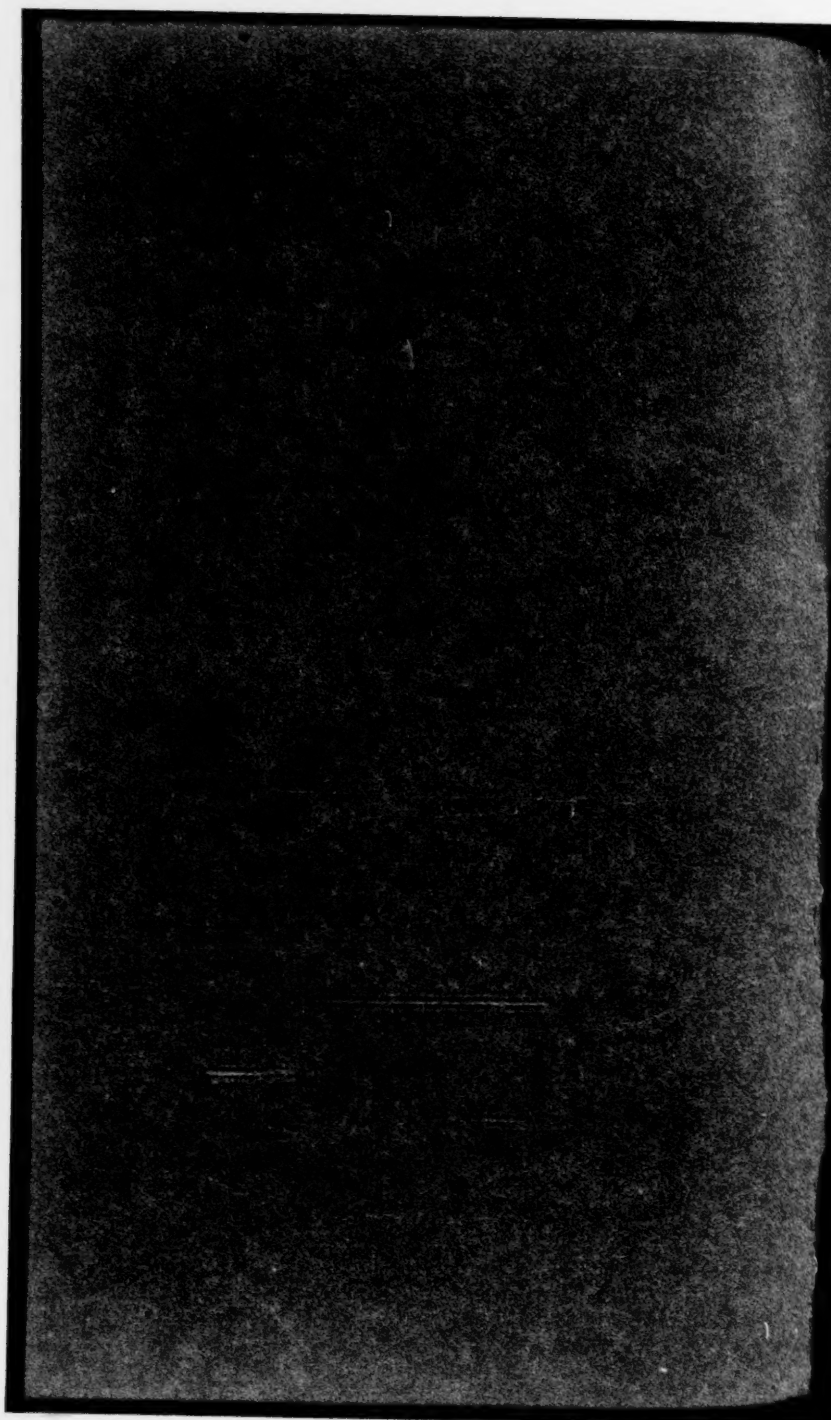
JOHN T. DYE,  
*Defendant in Error.*

No. 401  
(20,405.)

BRIEF FOR DEFENDANT IN ERROR.

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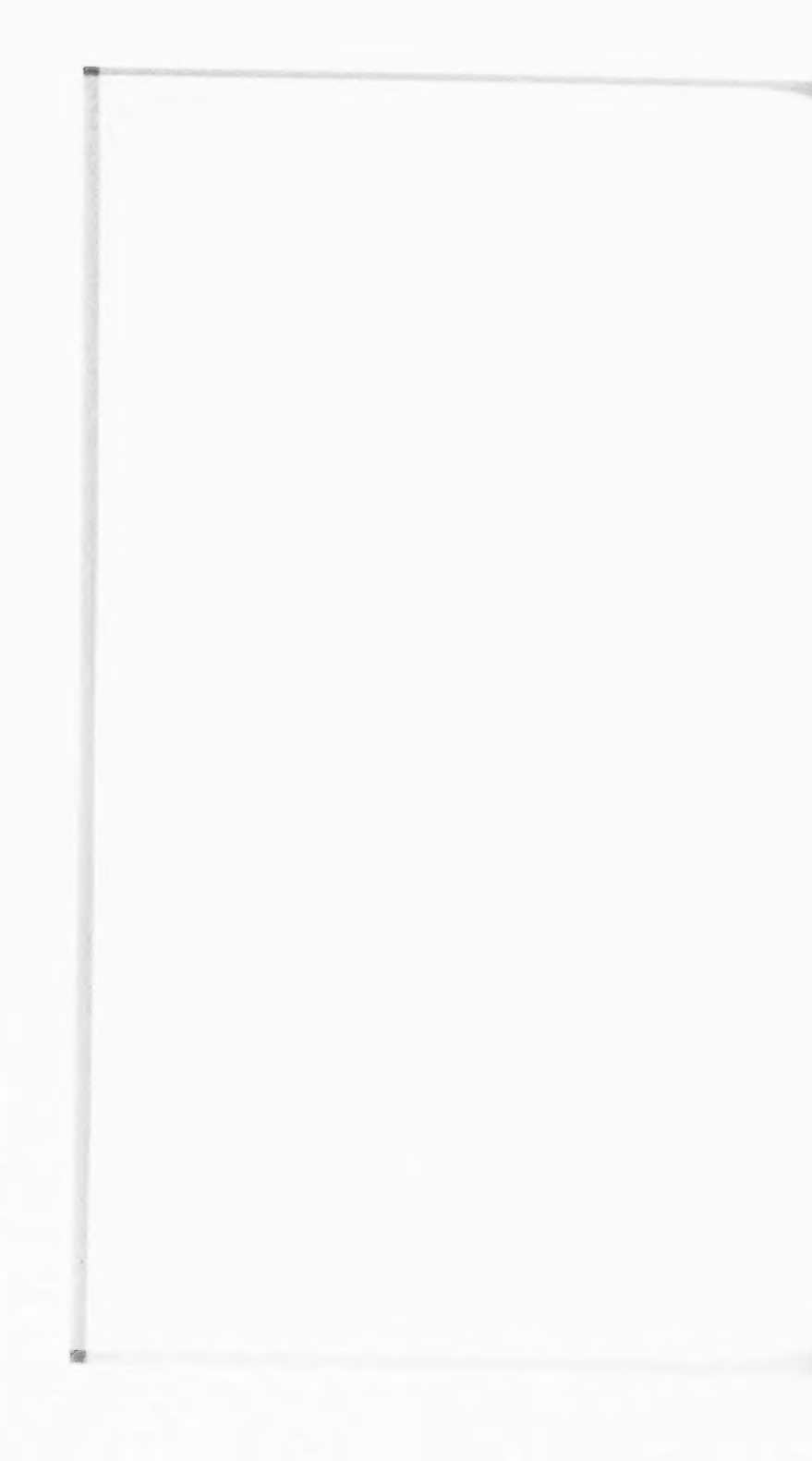
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*Of Counsel.*



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IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1913.

THOMAS R. MARSHALL ET AL., <i>Plaintiffs in Error,</i>	}	No. 890. (23,465.)
v.		
JOHN T. DYE, <i>Defendant in Error.</i>		

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

THE CASE TERSELY STATED.

The Constitution of the State of Indiana which took effect on November 1, 1851, contains the following article:

"Article 16. *Amendments.* 1. Any amendment or amendments to this constitution may be proposed in either branch of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of the State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution.

"2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately; and while an amendment or amendments which shall have been agreed upon by one General Assembly shall be awaiting the action of a succeeding General Assembly, or of the electors, no additional amendment or amendments shall be proposed."

The statutes of Indiana so far as material to this case are as follows:

*(Section 6907, 2 Burns Annotated Indiana Statutes 1908.)*

"Whenever a proposed constitutional amendment or other question is to be submitted to the people of the State for popular vote, the Secretary of State shall duly, and not less than thirty days before election, certify the same to the clerk of each county in the State, and the clerk of each county shall include the same in the publication provided for in section 23 of this act."

*(Section 6897, 2 Burns Annotated Indiana Statutes 1908.)*

"The Governor of the State, and two qualified electors by him appointed, one from each of the two political parties that cast the largest number of votes in the State at the last preceding general election, shall constitute a State board of election commissioners. Such appointments shall be made at least thirty days prior to each general election, and if, prior to that time, the chairman of the state central committee of either of such parties shall nominate in writing, a member of his own party for such appointment, the Governor of the State shall appoint such nominee. In case of death or disability of either appointee, the Governor of the State shall notify the chairman of said central committee of such appointee's political party, and such chairman may, within three days thereafter, recommend a successor, who shall thereupon be appointed: *Provided*, That if such chairman shall fail to make recommendations of appoint-

ment within the time specified, the Governor of the State shall make such appointment of his own selection from such political party. It shall be the duty of said board to prepare and distribute ballots and stamps for election of all officers for whom all the electors of the State are entitled to vote. In compliance with the provisions of the election law. The members of such board shall serve without compensation."

*(Section 6944, 2 Burns Annotated Indiana Statutes 1908.)*

"Whenever any constitutional amendment or other question is required by law to be submitted to popular vote, if all the electors of the State are entitled to vote on such question, the state board of election commissioners shall cause a brief statement of the same to be printed on the state ballots, and the words 'yes' and 'no' under the same, so that the elector may indicate his preference by stamping at the place designated in front of either word. If the question is required by law to be voted on by the electors of any district or division of the State, the board or boards of election commissioners of the county or counties including or included in such division or district, shall cause similar provision to be made on the local ballots. In case any elector shall not indicate his preference by stamping in front of either word, the ballot as to such question shall be void and shall not be counted."

On March 4, 1911, the General Assembly of the State of Indiana passed an act entitled as follows:

"An act to submit to the voters of the State of Indiana at the general election to be held on the first Tuesday after the first Monday in November, 1912, a new constitution permitting the same to be adopted or opposed by any political party, and if so adopted or opposed providing the method in which the same shall become a part of the party ticket, providing for the canvass of the votes and the proclamation of the Governor announcing its adoption or rejection, and other matters connected therewith."

which act is numbered and is designated in the pleadings and opinion of the Supreme Court of Indiana as "Chapter 118."

The first section of the act reads as follows:

"Section 1. Be it enacted by the general assembly of the State of Indiana, That at the general election to be held upon the first Tuesday after the first Monday in the month of November, 1912, there shall be submitted to all the legal voters of Indiana, for adoption or rejection, the following proposed new constitution:"

Then follows the so-called proposed constitution as a part of said section. The same appears at full length in the transcript, beginning at page 16.

Section 3 of said act reads as follows:

"Section 3. All election officers and other officials required by law to perform any duties with reference to general elections, shall perform like duties with reference to the submission of this question to the people."

(Acts of 1911, p. 205 *et seq.*)

Shortly after the act took effect by the Governor's proclamation, which was made on the 21st day of April, 1911, Mr. John T. Dye, a male citizen of the United States and of the State of Indiana, over twenty-one years of age, and a property holder and taxpayer and an elector in said State residing in Marion County, Indiana, brought his action in the Marion Circuit Court, to enjoin Lew G. Ellingham, Secretary of State for the State of Indiana, from certifying to the clerk of each county in the State said proposed new constitution, and also to enjoin the State Board of Election Commissioners, consisting of Thomas R. Marshall, Muter M. Bachelder, and Charles O. Roemler, from causing to be printed on the state ballots to be prepared for the gen-

eral state election to be held on the 5th day of November, 1912, a statement as required by said Section 6944. The Bill of Complaint is found in the transcript, beginning at page 1, folio 3, and continuing to page 11, folio 23. The Bill of Complaint is grounded upon the fact that said act, Chapter 118, is unconstitutional and void under the existing Constitution of the State of Indiana. The first specification or reason reads as follows:

"1. The instrument made and set forth in said Chapter 118 and therein required to be submitted to all the voters of the State at the general election to be held upon the first Tuesday after the first Monday in the month of November, 1912, for adoption or rejection and called in said chapter a 'proposed new constitution' is, and the said act is, null and void because that the said general assembly sitting in the year 1911, and being the 67th regular session of the general assembly of the State of Indiana, had no legislative or other power under the present constitution of this State to frame or to submit to the people said instrument in manner and form as therein set forth. And so the said act is unconstitutional, null and void". (Transcript, page 3 foot *et seq.*)

Many other reasons are pleaded specifically and at length why the said act is unconstitutional.

The defendants appeared, filed no demurrer, but took issue as follows:

"Defendants herein for answer to the plaintiff's complaint say that they deny each and every material allegation therein contained". (Transcript, p. 12, folio 27.)

The practice code of Indiana provided in substance that—"When one of the parties request it with a view of excepting to the decision of the court upon the questions of law involved in the trial \* \* \* the court shall first state

the facts in writing, and then the conclusions of law upon them, and the judgment shall be entered accordingly." (1 Burns Annotated Statutes, 1908, Sec. 577.)

The case coming on for trial on June 15, 1911, the defendants filed the following request:

"The defendants request the court to find the facts in the above entitled cause specially and to state his conclusions of law thereon." (Tr., p. 13.)

And thereupon the trial proceeded, and afterwards on the 6th day of October, 1911, the court filed the special finding of facts beginning on Transcript, page 14, folio 30, and continuing to the foot of page 50. The conclusions of law are found on pages 51-52. The court found that Mr. Dye was a natural born male citizen of the United States who had resided in Marion County, Indiana, for more than fifty years last past; that he is an elector and qualified voter, and property holder and a taxpayer in said county, and stated he would vote at his precinct at the next general state election. That Thomas R. Marshall was elected Governor at the general election of 1908 for the term of four years and that as such officer he appointed Muter M. Bachelder and Charles O. Roemler as members of the State Board of Election Commissioners for the State. That they accepted and qualified, and together with the defendant Thomas R. Marshall constitute the State Board of Election Commissioners.

That the defendant Lew G. Ellingham was elected Secretary of State at the general election of 1910, for the term of two years, and that he qualified and is discharging the duties of said office and that he had made no certificate to the county clerks as provided by section 6907 (Tr., p. 48), but that he would do so unless enjoined. That the said State

Board of Election Commissioners had done no act provided under said section 6944 and other duties as provided in said Chapter 118, but would do so unless enjoined from so doing and would cause to be printed on the state ballots to be voted at the general election in 1912 a brief statement of said act, Chapter 118. (Tr., p. 48, folio 91.)

Upon these facts the court made seven conclusions of law; the First reading as follows:

*"1st Conclusion of Law.*

"The court concludes as a matter of law upon the foregoing facts that the law of the case is with the plaintiff; and the act approved March 4, 1911, being Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana, submitting the proposed new constitution set forth in Paragraph 2 of the facts above found, is invalid and void for lack of power vested in 67th General Assembly of the State of Indiana to propose and submit the same to the electors of the State in the manner in which it is proposed therein."

Other conclusions of law read as follows:

*"2nd Conclusion of Law.*

"The court concludes as a matter of law upon the facts set forth in the special findings that the act, approved March 4, 1911, being Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana, submitting the proposed new constitution, is invalid and void because not proposed in accordance with the provisions of the present constitution of the State of Indiana but in violation thereof; and because in the exercise of legislative power as given to the said General Assembly in and under the Constitution of the State of Indiana the said Assembly had no power to frame and submit to the electors of the State of Indiana the said proposed new constitution in the special findings set forth, and the said act is unconstitutional, null and void."



*"5th Conclusion of Law.*

"The court concludes, upon the said facts that the law is with the plaintiff; and that he is entitled to have an injunction against the defendant Lew G. Ellingham, Secretary of State for the State of Indiana, enjoining him from certifying to the clerk of each or any county in the State not less than thirty days before the election to be held in November, 1912, or at any time, the said proposed constitution set forth in paragraph 2 of the special findings; or any other question touching the same.

(Section 6909.)

*"6th Conclusion of Law.*

"The court concludes as a matter of law upon the said facts that the State Board of Election Commissioners, named in said finding, to wit: Thomas R. Marshall, Muter M. Bachelder, and Charles O. Roemler, their successor or successors in office, should be enjoined from causing a brief statement or any statement of or concerning the said proposed new constitution, set forth in Finding 2 above, to be printed on the state ballots or on any ballots to be provided, distributed, and used by the electors of the general election to be held in November, 1912; or at any election to be held in the State of Indiana; and that the plaintiff is entitled to have an injunction preventing the same being done in whole or in part."

To each conclusion each defendant excepted separately.  
(Tr., pages 52-53.)

No motion was made for a new trial and the evidence is not in the record. Motions in arrest of judgment were filed and overruled, and on plaintiff's motion for judgment in his own favor on the conclusions of law stated on the special findings of fact, the court made the judgment as follows:

## JUDGMENT.

*“First.* That the defendant, Lew G. Ellingham, Secretary of State for the State of Indiana, and his successor and successors in office be, and he is hereby enjoined and restrained from certifying to the clerk of each or any county in the State of Indiana not less than thirty (30) days before the general election to be held in the month of November, 1912, or at any time, the said proposed constitution set forth in Paragraph 2 of the Special Findings of Fact, or any question touching the same.

*“Second.* That the defendants, Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, composing the State Board of Election Commissioners, and their successor and successors in office, be and they are jointly and severally enjoined and restrained from causing a brief statement of or concerning the said proposed new constitution set forth in Finding 2 above herein, to be printed on the State ballot or on any ballot or ballots to be by them or any of them or their successor or successors distributed and used by the electors of the State of Indiana at the next general election to be held in the State of Indiana, or any other election to be held in said State.

*“Third.* It is further ordered and adjudged that the plaintiff recover of the defendants his costs and charges herein taxed at \$——. (Tr., pp. 56-57.)

Mention of a federal question was for the first time made in the motions in arrest of judgment in these words:

*“Sixth.* For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Article 4 \* 4 of the Constitution of the United States which guarantees to every State of the United States a republican form of government.” (Tr., p. 54.)

And the fifth assignment in the separate motion made by Thomas R. Marshall, as governor, reading:

“*Fifth.* For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Article 4 \* 20 of the Constitution of the United States which guarantees a republican form of government to every State of the United States.”

The assignments of error in the Supreme Court were to the effect, first, that the complaint did not state a sufficient cause of action, and second, that the court had not jurisdiction of the subject matter of the action; fourth, the court erred in stating each of his conclusions of law upon the special findings; fifth, the court erred in overruling the appellants' motion in arrest of judgment; sixth, the court erred in overruling the motion of appellant Thomas R. Marshall in arrest of judgment. (Tr., pp. 59, 60, 61, 62, 63 64.)

On final hearing, the Supreme court “being advised in the premises affirms the judgment of the court below with the following opinion pronounced by Cox, Chief Justice, and a dissenting opinion pronounced by Morris, J., in which Spencer, J., concurs:” (Tr., page 65, folio 128.)

The opinions are set out in full in the Transcript, the opinion of the court begins at page 66, and the dissenting opinion begins on page 113.

### THE QUESTION DECIDED.

The Chief Justice stated the case as follows:

“The underlying question involved, out of which all others presented grow, is simply whether the act printed as Chapter 118 is a valid exercise of legislative power by the General Assembly.” (Tr., p. 67.)

Ellingham v. Dye, 99 N. E. L.

The court decided it was not.

"We find as indicated that the act of March 4, 1911, known as Chapter 118 is in violation of the Constitution and void; and the judgment of the lower court is affirmed." (Tr., p. 113.)

Ellingham v. Dye, 99 N. E. 1.

The act being violative of the Constitution of the State, because not a valid exercise of legislative power, no other question could be adjudicated.

And so the Supreme Court of Indiana said in this case:

"Sound legal and political principles, the history of our political life as a State, and the authority of judicial and commentatorial opinion, all unite in forcing the conclusion that the act of 1911 is invalid for want of power in that body to draft an entire constitution and forthwith submit it to the people under its general legislative authority if the instrument be conceded to be a new constitution and not merely amendments; and that, if it be considered as merely a series of amendments, it is a palpable evasion and disregard of the requirements and checks of Article 16, and is for that reason void. This conclusion renders unnecessary any consideration of the other objections raised against the validity of the act." (Tr., p. 95.)

Ellingham v. Dye, 99 N. E., p. 18-19.

### THIS IS NOW A MOOT CASE AND SHOULD BE DISMISSED.

The act of 1911 (Chapter 118) declared that the "proposed new constitution" should be submitted to all the legal voters of Indiana for adoption or rejection "at the general election to be held on the first Tuesday after the first Monday in the month of November, 1912."

The Constitution provides that: All general elections

shall be held on the first Tuesday after the first Monday in November.

Article 2, Section 14, 1 Burns, Section 95.

The "proposed new constitution" was not submitted to or voted on by the electors on that day nor at any time.

After the decision of this case the General Assembly on March 15, 1913, passed an act which provides that the voters at the regular election to be held in November, 1914, shall "vote for or against the calling a convention to alter, revise, or amend the Constitution of the State of Indiana, or to formulate a new constitution if deemed advisable."

The act further provides if a majority of the voters voting at the November election, 1914, be in favor of calling a constitutional convention, then a special election shall be held on the first Tuesday after the first Monday in March 1915, to elect delegates to the Constitutional Convention which shall assemble in Indianapolis the first Monday in May, 1915.

Acts 1913, p. 812, sections 1, 2, 8, 13.

So that, *first* no election can be held under the act of March, 4, 1911, as the time fixed has passed, and, *second*, the act of March 15, 1913, provides another and subsequent method of changing the existing Constitution, which necessarily repeals the first act if it were a valid law.

It follows that this case is now a moot case and should be dismissed.

Mills v. Green, 159 U. S. 651, 653;  
State of Pennsylvania v. The Wheeling and Belmont Bridge Co., 18 How. 421;  
California v. San Pablo and Tulare R. Co., 149 U. S. 308, 314;

New Orleans Flour Inspectors v. Glover, 160 U. S. 170;

Jones v. Montague, 194 U. S. 147, 151;

Tennessee v. Condon, 189 U. S. 64;

Richardson v. McChesney, Secretary of State, 218 U. S. 487.

This court will take judicial notice of the beginning and ending of the terms of Thomas R. Marshall, as Governor of Indiana, Lew G. Ellingham, as Secretary of State thereof, and of the beginning and duration of the terms of Muter M. Bachelder and Charles O. Roemler as the other members of the State Board of Election Commissioners. It is well settled that this court takes judicial notice of State constitutions, State statutes, and who are State officers, and all matters of which the courts of Indiana take notice in this case.

Richardson v. McChesney, 218 U. S. 487;

Brown v. Piper, 91 U. S. 37;

Daniels v. Tearney, 102 U. S. 519;

Mills v. Green, 159 U. S. 651;

Jones v. Montague, 194 U. S. 147;

Codlin v. Kohlhausen, 181 U. S. 151;

Tennessee v. Condon, 189 U. S. 64.

The Supreme Court of Indiana takes judicial notice of state elections and returns, and of official matters of general importance appearing upon the records in the public office of the Secretary of State and other State officers.

In re Denny, 156 Ind. 104;

State v. Patterson, 116 Ind. 45;

Copeland v. State, 126 Ind. 57;

Board v. May, 67 Ind. 562;

Nitche v. Earle, 117 Ind. 270;

State v. Gramelspacher, 126 Ind. 398;

Jeffersonville v. Louisville, etc., Co., 169 Ind. 645;

State v. Bigler, 171 Ind. 646.

It will not be maintained on behalf of plaintiffs in error that any election was had in the matter of the adoption or rejection of the proposed new constitution. Their brief admits the contrary. (P. 31, 42, 65, foot.) Of course if the election had been held plaintiffs in error could not have brought the record here under any view.

Again the writ of error was not even sued out until November 26, 1912 (Tr., p. 32), whereas the general state election at which the proposed new constitution was to have been submitted was on the 5th day of November, 1912.

The term of office of Thomas R. Marshall, as Governor of Indiana, expired January 11, 1913.

The term of office of Lew G. Ellingham, as Secretary of State of Indiana, expired November 27, 1912.

On the 23d day of August, 1912, Will H. Thompson and John Hollett were appointed as members of the State Board of Election Commissioners which terminated the appointments of Muter M. Bachelder and Charles O. Roemler on that date.

The Court will take judicial notice of the public records of the State in the office of the Secretary of State that no returns were made or canvassed of any vote on the proposed new Constitution. So that this case falls within the rule, that if from any cause it becomes "impossible for this Court to grant him (appellant) any effectual relief whatever, the Court will not proceed to a formal judgment but will dismiss the appeal."

Mills v. Green, 159 U. S. p. 653.

“The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case”.

Richardson v. McChesney, 218 U. S. p. 492.

### THE PLAINTIFFS IN ERROR HAVE NO PERSONAL INTEREST AND HAVE NOT BEEN HURT.

The plaintiffs were state officers. They had no personal interest in the litigation. The case being decided against them in the Marion Circuit Court, they sought the advice of the Supreme Court of their State on appeal whether they should obey the judgment below; and the Supreme Court decided they should, and they did. They have no right therefore to bring the case here.

Smith, Auditor of Marion County v. Indiana,  
191 U. S. 138, 148;

Braxton County Court v. The State of West  
Virginia, 208 U. S. 192.

In Smith's case an action was brought against him as the Auditor of Marion County to compel him to allow a certain amount of property to be exempt from taxation as authorized by a certain act of the General Assembly of Indiana. The question was whether the act was unconstitutional as the Auditor insisted. The circuit court held it to be void. The Supreme Court on appeal held the act to be valid, and remanded the case to the lower court, where the Auditor answered at length that it was invalid both under the constitutions of the State, and the United States. The trial court then held the statute valid, and Smith appealed to the Supreme Court, where the case was affirmed, and Smith then brought his case to this court,



and sought to present questions under the Federal Constitution. This court dismissed the case because:

"It is evident the Auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of these duties was of no personal benefit to him. He neither gained or lost anything by invoking the advice of the Supreme Court as to the proper action he should take.

"We think the interest of an appellant in this court should be a personal and not an official interest, and that the defendant having sought the advice of the courts of his own State in his official capacity should be content to abide by their decisions."

And this rule was enforced against the Braxton County Court, officers of the State of West Virginia, although they asserted the action of the State complained of was in violation of Section 10, Article 1 of the Federal Constitution.

This the court said "does not always give this court jurisdiction to review the judgment of the State court."

"The party raising the question of constitutionality, and invoking our jurisdiction must be interested in, and affected adversely by the decision of the State court sustaining the act, and the interest must be of a personal, and not of an official nature."

By the same token when the Supreme Court of Indiana advised the plaintiffs in error as State officers that the statute in question was void, they must remain content. It makes for good government that state officers must obey the command of the Supreme Court as to their duties under state laws. The Supreme Court held Chapter 118 was no law. As said in *Smith v. Indiana supra*, whether a statute, is a law, or no law "is a purely local question."

Besides, the bare averment of a federal question is not

enough. "There must be at least color of ground for such averment."

New Orleans v. N. O. Water Works Co., 142 U. S. 79, 87;

Hamblin v. Western Land Co., 147 U. S. 531, 532.

There is no color of ground for a State officer to say that a judgment of the Supreme Court of his State that a state statute is void under the Constitution of that State, violates Section 4, Article 4 of the Constitution of the United States.

We submit that the case should be dismissed for lack of jurisdiction.

#### NO FEDERAL QUESTION.

The defendant in error maintains that no federal question is presented upon the record.

*First.* No federal question was decided by the Supreme Court of Indiana.

*Second.* The plaintiffs in error did not attempt to set up any federal question until after the issues were made, the trial had, and the court had made and filed the special findings of fact and stated the conclusions of law thereon.

*Third.* The plaintiffs in error being state officers had no duties to perform under a void statute and so have no rights secured under the Federal Constitution to be violated.

Of these in the order named:

(1) The Supreme Court decided but one question, *viz*: It affirmed the first and second conclusions of law of the trial court that Chapter 118 "is invalid and void for lack of power vested in the 67th General Assembly of the State

of Indiana to prepare and submit the same to the electors of the State in the manner in which it is proposed therein"; and because not prepared in accordance with the provisions of the present constitution of the State of Indiana but in violation thereof; and because in the exercise of legislative power as given to the said General Assembly in and under the Constitution of the State of Indiana the said Assembly had no power to frame and submit to the electors of the State of Indiana the said proposed new Constitution in the Special Findings set forth, and the said act is unconstitutional, null and void. At the threshold of the opinion the court stated the case in these words:

"The underlying question involved out of which all the others presented grow, is simply whether the act presented as Chapter 118 is a valid exercise of legislative power by the General Assembly." (Tr., p. 67.)

Then follows the opinion of the court showing a careful study of the Constitution and form of our State Government and holding and adjudicating: "that the act of March 4, 1911, known as Chapter 118, is in violation of the Constitution and void, and the judgment of the lower court is affirmed."

This being so there was no further question to be decided except whether the Marion Circuit Court had jurisdiction to entertain this case, and enjoin the Secretary of State, and the State Board of Election Commissioners from carrying this void law into execution. The trial court in the 5th and 6th conclusions of law held that it had. And these conclusions were effected by the decree of injunction, which the Supreme Court affirmed. This point was carefully considered by the court, and the cases decided in this court, in the courts of many States, and in Indiana as well examined at length. This part of the opin-

ion begins at the foot of page 95 of the Transcript and continues to the end of the discussion.

Near the close of the discussion (Tr., p. 112,) the court said:

"The power to control by mandamus and injunction the ministerial acts of officers in relation to elections under unconstitutional statutes has been declared by this Court, and Courts of other States, in apportionment cases."

Citing *Parker v. State*, 133 Ind. 178;

*Brooks v. State*, 162 Ind. 586 (citing many cases);

*Fesler v. Brayton*, 145 Ind. 71.

The court continues:

"Many of the decisions reviewed above establish the capacity of the appellee to sue in such a case as this, and with this view our own cases are in harmony."

*Harney v. Indianapolis, etc., R. Co.*, 32 Ind. 248;

*Board v. Markle*, 46 Ind. 96;

*English v. Snook*, 34 Ind. 115;

*Denney v. State*, 144 Ind. 503;

*Fesler v. Brayton*, 145 Ind. 71;

*Brooks v. State*, 162 Ind. 568;

*Remster v. Sullivan*, 36 Ind. App. 385;

*Gemmer v. State*, 163 Ind. 158;

*Spencer v. Knight*, 98 N. E. 312.

And in support of the proposition that a state officer may be enjoined, including State Boards and Commissions of which the Governor is *ex-officio* a member from enforcing an unconstitutional and void statute, the court followed many cases decided by this court among which are:

*Garfield, Secy. of Interior, v. U. S.* 211, U. S. 249, 261;

*Ballenger, Secy. Interior, v. U. S.* 216, U. S. 240;

Board of Liquidation v. McComb, 92 U. S. 531;  
 Pennoyer v. McConnaughy, 140 U. S. 1;  
 Noble v. Union River Logging Co., 147 U. S. 172;  
 Brown v. Trousdale, 138 U. S. 389;  
 Smyth v. Ames, 169 U. S. pp. 518-19;  
 Davis v. Gray, 16 Wall, 203, 210, 220.

It is enough to say that it is for the Courts of Indiana to construe and apply the State Constitution and State laws and determine whether the Marion Circuit Court erred; and the Supreme Court had jurisdiction of the question in this case. There is no clause in the Federal Constitution, and no statute of Congress that gives this court jurisdiction to try that question on appeal.

It has often been held that the Governor and other state officers may be enjoined from acting under a void law.

Mott v. Pa. R. R. Co., 30 Pa. 9 (Gov. and others);  
 Lynn v. Polk, 8 Lea, p. 152 (State officers);  
 Wells v. Bain, 75 Pa. 39 (Election Commissioners);  
 Woods' Appeal 75 Pa. 59;  
 Warfield v. Vandiver, 101 Md. 78 (Governor);  
 Livermore v. Waite, 102 Cal. 113 (Sec'y of State);  
 Holmberg v. Jones, State Aud., 7 Idaho 752;  
 Taylor v. Louisville & N. R. Co., 88 F. 350 (State Board);  
 Governor v. Nelson, 6 Ind. 496;  
 Baker, Governor, v. Kirk, 33 Ind. 517;  
 Gray, Governor, v. State, 72 Ind. 567.

It therefore appears on this record that it was not necessary to the judgment of the Supreme Court that the questions of law stated in the 3d and 4th conclusions of the trial court should be, nor were they, considered or decided directly or by implication.

(These questions were whether certain provisions of the Ordinance of 1787, the Act of Congress enabling the people of Indiana to form a State, and the State Ordinance accepting the provisions of such Enabling Act were a part of the law of Indiana.)

We mention the rule, in the minds of all, that where the State court in rendering judgment decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to support the judgment, this court will dismiss the writ of error.

*Rutland R. Co. v. Central R. Co.*, 159 U. S. 60.

It is asserted by plaintiffs in error that the Supreme Court decided a federal question against them. This is not true. If it were it would avail nothing; for it is settled that where a State Supreme Court decides a federal question, and also bases its judgment on another independent ground broad enough to maintain the judgment, the writ of error will be dismissed.

*Hammond v. Johnston*, 142 U. S. 73, 78.

(2) The contention made on behalf of the plaintiffs in error as we understand it is: that there is conferred by Section 4, Article 4 of the Constitution of the United States upon the Legislature of Indiana plenary power at pleasure to frame and submit to the electors as often as that body wills proposed new constitutions, anything in the existing Constitution of the State to the contrary notwithstanding. And that, therefore, Chapter 118 is a valid law of the State of Indiana and that the plaintiffs in error have the federal right to enforce the law although the Supreme Court of the State of Indiana decides the act to be unconstitutional and invalid under the Constitution of the State.

This must be the contention, for in a cause coming from

a Supreme Court the jurisdiction is "limited to the specific instances of denials of Federal rights \* \* \* specially set up in the State Court and denied by the rulings and judgment of that court."

Waters, *Pierce Oil Co. v. Texas* 212 U. S. p. 97.

We beg leave to submit, first, that this contention is not brought here within the meaning of Section 237 of the present act, being Section 709 Revised Statutes. The case must be put in the third class of cases made by that section; that is, upon this record it must appear that at the proper time and in a proper manner the plaintiffs in error especially set up some title, right, privilege or immunity under the Constitution of the United States exempting them from the jurisdiction and judgment. What right or privilege or immunity these plaintiffs in error had to exempt them from suit are not stated especially. To the bill of complaint they were content to file the general issue. On this they went to trial and took special findings. And it was not until the findings and conclusions had been made against them and filed by the trial court that any mention is made of the constitutional provision. And then that mention is made in these words found among many reasons given in the motions to arrest judgment, to wit: "6. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Article 4 of the Constitution of the United States which guarantees to every State of the United States a republican form of government."

Is this specially setting up some federal right which these State officers have, rendering them immune from suit when about to engage in the enforcement of a State statute violative of the State Constitution?

To sustain this contention it seems to us that they must affirm that the statute while void under the Constitution of the State is valid under the Constitution of the United States. Can it be thought that the people of a State may not provide in their Constitution that the Legislature which they create thereunder shall not have power to frame for them and require them to vote on the adoption or rejection of changes and alterations proposed in their established form of State government except in a way marked out in their constitution?

And if the Legislature does do that very thing in violation of the Constitution can it be thought such a void legislative act is yet valid under the provision that the United States shall guarantee to every State a republican form of government?

And when the Legislature of 1911 undertook to frame and submit amendments and alterations in the form of our State government in another way and manner, than in the Constitution provided, and after the Supreme Court adjudicates the act to be no law, we venture to ask: What federal right, privilege or immunity of these plaintiffs in error or any one of them has been violated?

We find none specially mentioned in their brief. Have these plaintiffs in error any "right", any "privilege", or any "immunity" which excepts either the Secretary of State or the members of the board of election commissioners from obedience to the Supreme Court of the State?

In behalf of Thomas R. Marshall it is said that because he was Governor he had a right or privilege to enforce this void act and was immune from judicial control. To this the Supreme Court answered that while sitting as a member of the State Board of Election Commissioners he was not sitting as Governor, for his executive powers



are single to him alone; and when sitting with two other State officers to exercise a power jointly or by a majority he is not exercising the power vested in the Governor, because the other two against his will and protest might make the action of the board contrary to his will and judgment.

Moreover, he was not sued in his executive capacity as Governor but as a member of the board of three composing the State Board of Election Commissioners. In the Marion Circuit Court he appeared and joined with the others in the general issue. We take it if a Governor or other officer on being sued once waives his right or privilege or immunity of exemption from judicial authority he cannot thereafter, when beaten, be heard to say that the court had no jurisdiction. Besides, as appears by the cases cited upon p. 20, he may be sued if he is using an unconstitutional law to the injury of others; and especially in a matter not of discretion.

It appears upon the record that both the Marion Circuit Court and the Supreme Court held they had jurisdiction over the subject-matter, viz: whether Chapter 118 was a law; and that Mr. Dye had a right to enjoin the defendants from enforcing it. Can it be said that this judgment is violative of the clause in the Federal Constitution relied upon; that the United States shall guarantee to every State in this Union a republican form of government? Does the decision of the Supreme Court of Indiana destroy and overthrow the existing form of republican State government? It still stands as a State. And the last session of the Legislature on March 15, 1913 (Acts 1913, p. 812), enacted that an election should be had in November, 1914, whether the people wanted a constitutional convention to be called "to alter, revise or amend the Constitution of the State of Indiana, or formulate a new constitution if deemed advis-

able." As pointed out in the opinion of the Supreme Court (Tr., pp. 75-6), this is the method recognized in this and other States, enabling the people to alter their existing Constitutions. In addition to this method, in Article 16 *supra*, page 1, the people provided another method of making amendments to the existing constitution.

It has often been held that the mere averment of a federal question is not enough to give this court jurisdiction over the judgment of a State court. A bare averment of a federal question is not sufficient. There must be a real and not a fictitious federal question apparent upon the record in order to confer jurisdiction.

Hamblin v. Western Land Co., 147 U. S. p. 532.  
and cases cited.

We submit that the attempt to raise a federal question as to the validity of the judgment of the Supreme Court of Indiana in this case under the claim that the court had no right to make the judgment because such judgment violates Art. 4, Sec. 4, of the Constitution of the United States is fictitious, without foundation, and therefore the case should be dismissed.

(3) Whether a Secretary of State, and members of a State Board or Commission can be sued and enjoined from enforcing a void act, is a matter of State jurisprudence. It is not a federal question in any sense.

This question is considered at length in the opinion (Tr., pp. 194 to 109.)

And it is pointed out that this court in *Pennoyer v. McCaughy*, 140 U. S. 1, held injunction would lie against a State Board composed of the Governor, Secretary and Treasurer of State to prevent them acting under an unconstitutional act.

The Supreme Court of Indiana compelled by mandate action of a State Board composed of the Governor, Attorney-General, Secretary of State and Treasurer of State,

*Gray, Governor, v. State, 72 Ind. 567.*

And the Supreme Court in this case sustained the injunction because as said:

“An unconstitutional law gives no power and imposes no duty.”

It is not necessary to repeat the many other citations in the opinion. It is enough to know that in Indiana a Secretary of State and members of State boards composed of the Governor and other State officers may be enjoined from enforcing an unconstitutional act.

Besides it cannot be thought that Section 4, Article 4 of the Federal Constitution has a thing to do with this question.

Neither has it aught to do with the question whether Mr. Dye, as an elector and taxpayer, had the right to sue for himself and the other electors and taxpayers to enjoin an election under an unconstitutional act.

Little need be said in response to the contentions of the plaintiffs in error that the people of the State of Indiana have the right to alter and reform their State government. That is not denied by any one. But of course it must be done by lawful means and methods. The plaintiffs in error could not of their own motion frame and submit a proposed new constitution. And as the act under which they were about to submit the same was unconstitutional, null and void under the existing Constitution of the State, that is just what they were about to do. When officers attempt to enforce an unconstitutional act concerning elec-

tions any elector has the right to arrest the action by injunction.

- Brooks v. State, 162 Ind. 568, 576-7;  
 Parker v. State, 133 Ind. 178;  
 Fesler v. Brayton, 145 Ind. 71;  
 Remster v. Sullivan, 36 Ind. App. 385. Approved  
 by the Supreme Court in this Case. (Tr.,  
 p. 112.)  
 Gemmer v. State, 163 Ind. 158;  
 Spencer v. Knight, 98 N. E. 342 (Ind.)

And so is the law in many other States.

- State v. Wrightson, 56 N. J. Law 126;  
 State v. Cunningham, 81 Wis. 477, 83 Wis. 90;  
 State v. Van Duyn, 24 Neb. 586;  
 Conner v. Gray, 88 Miss. 489;  
 Woods, Appeal, 75 Pa. 59;  
 Warfield v. Vandiver, 101 Md. 78;  
 Livermore v. Waite, 102 Cal. 113;  
 Tolbert v. Long, 134 Ga. 292;  
 Wells v. Bain, 75 Pa. 39;  
 Carton v. Sec'y of State, 151 Mich. 337.

#### THE ORDINANCE OF 1787 AS ACCEPTED BY THE STATE OF INDIANA.

One of the grounds set forth by Mr. Dye in his bill was that the proposed new constitution was violative of the law of Indiana as made by the Ordinance of 1787, the act of Congress enabling the State government to be organized of date April 19, 1816, and Ordinance of the Constitutional Convention of the State made on June 29, 1816. In the second article of the Ordinance of 1787 it was declared "the inhabitants of said territory shall always be entitled to the benefit \* \* \* of a proportionate representation of the people in the Legislature." In the 4th section of said Enabling Act it was provided that when the constitu-

tional convention was convened it "shall then form for the people of said territory a constitution and state government; provided that the same whenever formed shall be republican, and not repugnant to those articles of the Ordinance of the 13th of July, 1877, which are declared to be irrevocable between the original States and the people and States of the territory northwest of the River Ohio."

It was provided in the ordinance of the State Constitutional Convention that "we do for ourselves and our posterity agree, determine, declare and ordain that we will and do hereby accept the propositions of the Congress of the United States as made and contained in their act of 19th day of April, 1816, \* \* \* and that this ordinance and every part thereof shall forever be and remain irrevocable and inviolate without the consent of the United States in Congress assembled first had and obtained for the alteration thereof or any part thereof." Indiana Ordinance, R. S. Ind. 1843 p. 36.

The existing constitution of Indiana declares that the number of senators and representatives in the State Legislature shall "be fixed by law and proportioned among the several counties according to the number of male inhabitants above 21 years of age in each." Art. 4, Sec. 5. 1 Burns, R. S. 1908, Sec. 101.

The "proposed new constitution" changed said section so as to provide that each county without regard to population should have one representative in the House and an additional representative if it appeared on dividing the total population of the State as shown by the last national census by the number of counties, to wit, 92, any county had a greater population than  $1/92$  part of the entire population of the State equal to a full quota and fractional surplus. (Tr., p. 23, sec. 4.)

In the special findings the court found that the population of the State as shown by the 13th census was 2,709,876. (Tr., foot page 45.) Dividing the same by the number of counties shows the quota mentioned to be about 30,000. Under any construction of the provision in the proposed constitution no county could have more than one representative without it had at least 45,000 population. A glance at the population of the counties as set forth in the special findings (Tr., p. 46,) shows that eight counties only had a population in excess of that number. It will further appear that Ohio county had a population of 4,329, Brown county, 7,975, Scott county, 8,328, Switzerland, 9,914, Union, 6,260. So that these small counties would have in the Legislature the same representation as the counties of Tippecanoe with a population of 40,063, Cass with a population of 36,368, Sullivan with a population of 32,439, and so on. The trial court held as matter of law as shown in the 3d and 4th conclusions (Tr., p. 51,) that the said provision in the proposed new constitution was violative of the fundamental law of Indiana in the matter of proportional representation.

In appellants' brief, page 74 *et seq.*, the plaintiffs in error seem to insist that the correctness of the ruling of the Circuit Court in the matter under consideration is presented for review here.

To this we answer, first, that this question was not specially set up in the trial court by demurrer, answer or in the motions to arrest, nor was it specially set up in any assignment of error in the Supreme Court. Besides counsel fail to observe that questions of this class can only be brought on writ of error when the decision is against their validity.

As this federal question was not set up by the defend-

ants in error in the State courts, it became immaterial to be considered by the Supreme Court after that court had held that Chapter 118 was in violation of the existing constitution of the State, and void. But it is perhaps not improper to state, that the courts, federal and state, sitting in Indiana have held the ordinance of 1787 is the law of the State.

*Cox v. State*, 3 Blackf. 194 (1833). Approved in *Williams v. Beardsley*, 2 Ind. 596 (1851); *Jolly v. Terre Haute Bridge Co.*, 6 McLean 237.

The federal and State courts sitting in the other States carved out of the Northwestern territory have held the same:

*Spooner v. McConnell*, 1 McLean 337;  
*Vaughan v. Williams*, 3 McLean 530;  
*Palmer v. Cuyhoga Co.*, 3 McLean 226;  
*Hogg v. Zanesville, etc., Co.*, 5 Ohio 416;  
*Hutchinson v. Thompson*, 9 Ohio 52, 62;  
*Cochran's Heirs' Lessee v. Loring*, 17 Ohio, 409, 424-5;  
*State v. Boone*, 95 N. E. 924 (Ohio);  
*Giddings v. Blacker*, 52 N. W. 946 (Iowa);  
*Phebe v. Jay*, 1 Breese 268 (Ill.);  
*Connecticut Ins. Co. v. Cross*, 18 Wis. 109;  
*Milwaukee, etc., v. Schooner Gamecock, etc.*, 23 Wis. 144;  
*Wisconsin, etc., v. Lyons*, 30 Wis. 61;  
*Attorney-General v. Eau Claire*, 37 Wis. 400;  
*State v. Cunningham*, 51 N. W. 724, 729 (Wis.).

Whether the said provisions of the ordinance of 1787 are a part of the law of Indiana turns perhaps on the force and effect of the Ordinance of the Constitutional Convention made at Corydon on June 29, 1816.

Ind. R. S. 1843 p. 36.

And this we understand to be a question of State law only.

*Cincinnati v. Railroad Co.*, 233 U. S. p. 401

At most, it was not decided, or necessary to be decided by the Supreme Court of Indiana.

The defendant in error asks that the case be dismissed.

ADDISON C. HARRIS,

Attorney for defendant in error

September 18, 1913.



This Report Sent, R. I.  
FILED.

OCT 18 1913

JAMES D. McKEENEY,

IN THE  
Supreme Court of the United States

October Term, 1913

THOMAS B. MARSHALL, as  
Governor of the State of In-  
diana, et al.,

Plaintiffs in Error,

v.

JOHN T. BYE,

Defendant in Error.

NO. 401.  
(23,465.)

BRIEF FOR PLAINTIFFS IN ERROR.

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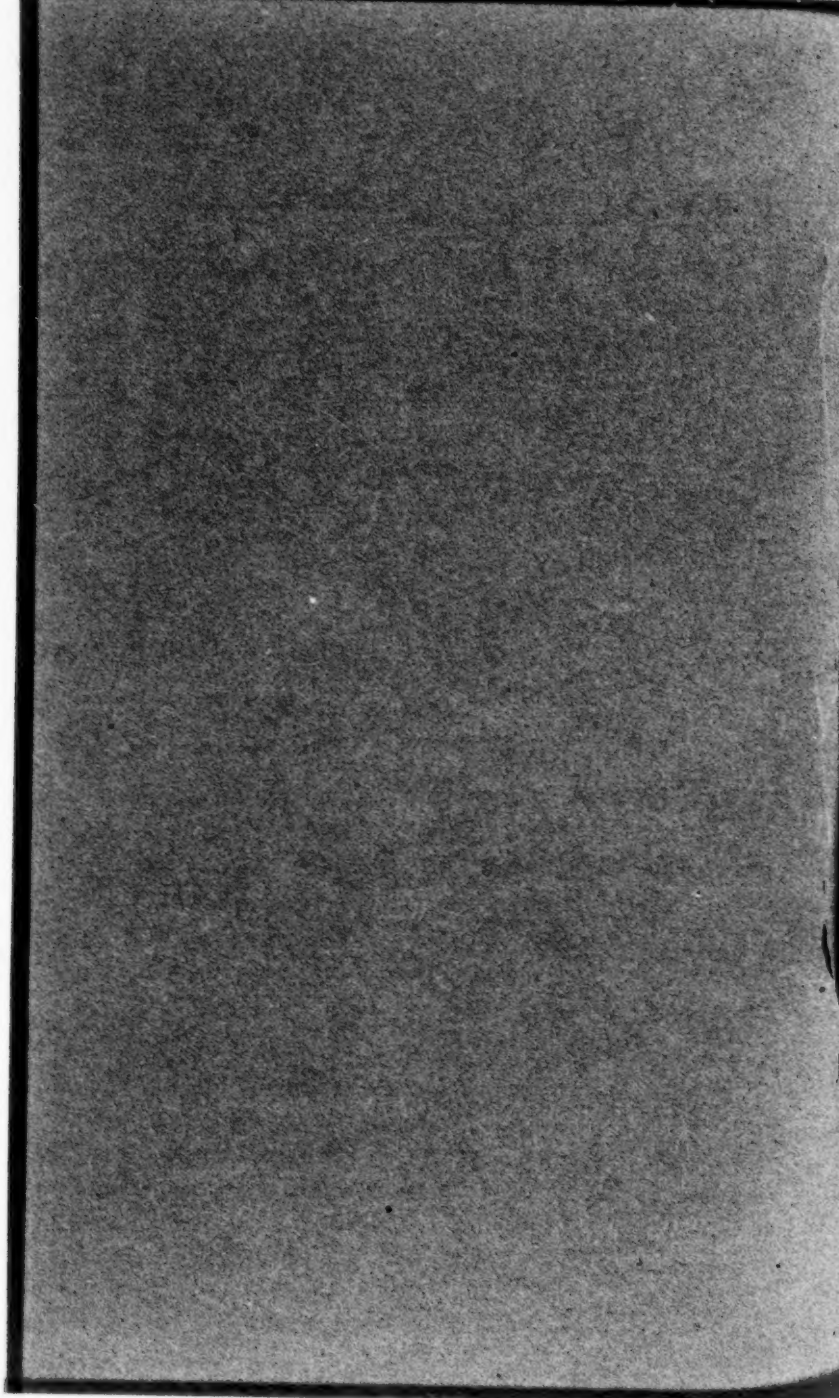
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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1913.

THOMAS R. MARSHALL, AS  
GOVERNOR OF THE STATE OF IN-  
DIANA, ET AL.,

*Plaintiffs in Error,*

v.

JOHN T. DYE,

*Defendant in Error.*

No. 890.

(23,465.)

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The defendant in error has filed a brief directed to matters collateral to the main issue, and to such new matter we beg to reply, as follows:

It is asserted that this "is now a moot case and should be dismissed." (Brief for defendant in error, p. 11.) In support of this proposition three several grounds are stated.

First. That submission to the voters cannot be made, the general election of November, 1912, having passed.

Second. That the Act of 1913 for taking the opinion of the voters relative to calling a constitu-

tional convention operates to make this case a moot one.

Third. That the expiration of the terms of office of the plaintiffs in error, Marshall, Bachelder and Roemler, makes the case a moot one.

Of these in their order:

1.

In the brief heretofore filed for plaintiffs in error the rule relative to the time when the proposed question shall be submitted is stated. (Brief for plaintiffs in error, pp. 67-77.) The idea that the submission to the people of the proposition proposed could be forever prevented by continuing litigation past the general election of 1912 seems to be a new one. The judgment is against the defendants and "*their successor and successors in office \* \* \** are jointly and severally enjoined and restrained from causing a brief statement or any statement of or concerning the proposed new constitution \* \* \* to be printed on the state ballot or ballots to be by them, or any of them, or their successor, or successors, distributed and used by the electors of the State of Indiana at the next general election \* \* \* or any *other election to be held in said state.*" (Record p. 57.)

The law of the State of Indiana is that:

"Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered *directory* merely, unless the na-

ture of the act to be performed, or the language used by the legislature, show that the designation of the time was intended as a limitation of the power of the officer."

Wampler v. State, ex rel., 148 Ind. 557-568.

This rule as shown by the case cited applies to the facts involved in the case at bar, and answers the first reason stated by the defendant in error.

The authorities cited by defendant in error as supportive of this position are none of them in point. In Mills v. Green, 159 U. S. 651-657, it is said:

"The whole object of the bill was to secure a right to vote at the election to be held on the third Tuesday of August, 1895."

The principle is that:

"It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

Mills v. Green, *supra*.

The Court could not by its judgment enable a man to vote at an election which had passed, but the Court by its judgment in the case at bar can remove the obstacle which has temporarily prevented the plaintiffs in error from doing that which it is their duty to do.

Neither is the case made a moot one by the Act of March 15, 1913. That was an act to provide for taking the sense of the qualified electors on a call for a constitutional convention. The question to be submitted is: "Are you in favor of a constitutional convention in the year 1915?" The answer is either "yes" or "no". It provides that the question shall be submitted at the regular election to be held in 1914. If this act repealed the Act of 1911 either in express terms or by necessary implication, the case would be governed by *Pennsylvania v. Wheeling Bridge Co.*, 18 Howard 421, where a court decree, which declared a bridge over the Ohio River to be an obstruction to the free navigation of the river, was rendered ineffective by an act of Congress subsequently passed declaring in effect that such structure was not an obstruction to the said river.

The Act of 1913, however, does not in terms repeal or affect the Act of 1911. Neither does it do so by implication. The provisions of both acts could very properly have been included under a single title. There is no inconsistency between them.

Upon a subject of so much importance as a change in the fundamental law of the State it is more than appropriate that there should be an opportunity for latitude of expression by the people. The necessity for a new constitution seems to be now conceded. If that conservative form set out in Chapter 118 of the Acts of 1911 meets the approval of the majority of

the voters of the State, there is no reason why their vote should not give it vitality. It is a safe assumption that if this is done, the proposition to hold a constitutional convention will be defeated. The contest will be a fair one between those who are satisfied with the conventional form of constitution, and those persons who are desirous of conducting novel experiments in the science of republican government.

The draft contained in Chapter 118 of the Act of 1911 will, if adopted, make possible laws having for their end honest elections. It has been drawn with that purpose in view. It will also take from the courts the disgrace of participating in legislative gerrymandering, and it expressly provides that there shall never be any recall of judges. Those who have held political power through illegal votes; those who have profited and hope to profit by legislative gerrymander, and those who wish the opportunity of recalling judges who do not please them, of necessity favor a constitutional convention. The issue will be perfectly clear, and it is appropriate that it should be fought out by the people.

It is interesting to note at this place that some citizens and electors may not wish the cost and chance of a constitutional convention, in which event, if the decision of the Supreme Court in this case stands, any one of the many circuit or superior judges of the state can prevent the governor and the executive department from submitting and the peo-

ple from voting upon the calling of a constitutional convention in 1914, and therefore, according to the counsel of defendant in error, prevent it forever.

## 3.

*The effect of the expiration of the terms of office of Governor Marshall, Bachelder and Roemler.*

The judgment by its terms, as heretofore appears, extends to the plaintiffs in error and their successors, prohibiting them from preparing the ballots for the election of 1912, or for any other election.

While the suit was originally begun against the plaintiffs in error as officers of the State of Indiana, it was in effect a suit against the office and against the people of the state represented by the plaintiffs in error. It therefore is one of those proceedings which may be commenced with one set of officers and terminated with another set, the latter being bound by the judgment.

Thompson v. United States, 103 U. S. 480;  
26 L. Ed. 521, and authorities cited.

The writ of error was sued out during the official term of Governor Marshall. That term has expired and Governor Ralston has succeeded to the office. The law relative to the substituting of the succeeding officer in such cases is stated by the Supreme Court of Ohio as follows:

“The point is not well taken. The action in such cases is regarded as against the treasurer,



whoever he may be, and it may proceed through all its stages in all courts in the same manner in which it was commenced, or, if desired, the new treasurer may, on motion, be substituted in the place of the retiring one, and this is certainly the better practice. The treasurer in office should, as one of his official duties, take charge of and look after all actions against or in behalf of his office; but a failure to substitute the new treasurer does not have the effect to abate the action, nor cause its dismissal on motion."

Pittsburgh, Ft. W. & C. Ry. Co. v. Martin,  
County Treasurer (Ohio), 41 N. E. 690-  
693.

And by the Supreme Court of Kansas as follows:

"The defendant's right of recovery is also questioned upon the ground that at the time of the trial his term of office had expired. Where a public officer is involved in litigation in his official capacity, the expiration of his term does not require a substitution of his successor. The public is conceived as being the real litigant. Pittsburgh, Ft. W. & C. R. Co. v. Martin, 53 Ohio St. 386, 41 N. E. 690; Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317; Shull v. Gray County, 54 Kan. 101, 107, 37 Pac. 994."

Hines v. Stahl (Kan.) 20 L. R. A. (N. S.)  
1118-1123.

There can be no objection to the substitution of the present officers for those against whom the action was brought, and leave to make such substitution will be asked, although it is not regarded as essential.

## THE FEDERAL QUESTION.

It is contended that no Federal question was decided by the Supreme Court of Indiana. (Brief for defendant in error, p. 17.)

The counsel does not in his discussion touch the fundamental proposition in the case. The situation is this:

The judicial department of the state, acting through the highest court of the state, has enjoined the governor from carrying out the law. It has enjoined the executive department of the government from performing functions which are exclusively within its domain, and it has interfered with the legislature to prevent it from taking the sense of the people upon a matter relating to the organic law, and therefore has prevented the people from expressing their will as to such subject.

The finding of fact as to what the plaintiffs in error are threatening to do is that "each of said named defendants, as such election commissioners \* \* \* will comply with and carry out the requirements of each and every statute of Indiana relative to the holding and conduct of said general election to be held in 1912 \* \* \* and will do each and every act required to be done by them according to law to submit said act \* \* \* to the electors of the State of Indiana and to all the legal voters of said state for their adoption or rejection at said election, unless enjoined from so doing; and that said defendant, Thomas R. Marshall, \* \* \* unless enjoined

from so doing, will at the general election to be held in 1912 cause a brief statement of said act \* \* \* to be printed on said ballot with the words 'yes' and 'no' under the same so that the electors may indicate their preference and vote for the adoption or rejection of the proposed constitution set forth in said act."

It is further found that neither of said defendants are "threatening to do any act or acts relative to the holding of said general election, or in the preparation of the ballots to be used at said election except such act or acts are required by the statute to be done by them." (Rec. p. 49.)

The governor, when confronted by the assertion of authority over him and the executive department by a co-ordinate department of the state government, could have disregarded the proceeding and ignored the attempted judgment and mandate. Such forcible action was entirely within the power of the chief executive. That he possessed the ability to exert sufficient force to maintain the integrity of his position makes his refusal to exercise it the more laudable. It was his desire not to take any action tending to assist in causing public distrust of either law or government. Force is in any case allowable only as a last resort—an alternative which cannot be avoided. The governor could maintain the integrity of the republican government of Indiana through force, but he believed that by invoking the aid of the Federal government under the guarantee of Article

4, Section 4 of the Constitution, the same end could be accomplished as by the strong arm and that without injury to institution or law.

This is what he is undertaking to do. Redress can be adequately administered only through the judicial department of the Federal government, and therefore he brings this writ of error. The objection to the judgment brought here for review is not that the Indiana Supreme Court decided wrongly, although such is believed to be the fact, but that *it had no authority to decide at all*. The doctrine that Federal courts follow state decisions with regard to matters of state law is well understood, but to invoke that doctrine in this case is to beg the whole question.

The Indiana Supreme Court had no power to assume control of the executive department, to "order the Governor around," nor to nullify legislative direction as to political matter; and when it arrogates to itself such authority, it repudiates the form of government under which it exists—repudiates the limitations upon its authority which are fixed by the republican government adopted in Indiana. Citizens of the United States who are also citizens of Indiana, represented by officers duly chosen by them, are well within their right and within the law in appealing to the Federal government to make good its guarantee as contained in Article 4, Section 4 of the Constitution.

A court "cannot under the guise of asserting judicial power usurp merely administrative functions."

*Interstate Commission v. Illinois Central R. R. Co.*, 315 U. S. 452.

(2) It is further said that the "plaintiffs in error did not attempt to set up any federal question until after the issues were made, the trial had, the court had made and filed the special findings of fact and stated the conclusions of law thereon."

The exact question which is here urged was presented to the trial court by separate motions in arrest of judgment before any judgment whatever had been rendered.

In disposing of a similar objection this Court said:

"While the constitutionality of the law was not specially set up and claimed before the trial in the circuit court, there was a motion made in arrest of judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the 14th Amendment to the Constitution. The motion was denied, although the supreme court did not in terms pass upon the Federal constitutionality of the law. But this was a sufficient presentation of the Federal question."

*Consolidated Coal Co. of St. Louis v. People of the State of Illinois*, 185 U. S. 203-206; 46 L. Ed. 875.

(3) The third proposition of defendant in error stated on page 17 of their brief is that the plaintiffs

in error, being state officers, had no duty to perform under a void law, and so have no rights secured under the Federal Constitution to be violated. The cases of *Smith, Auditor, v. The State*, 191 U. S. 138 and *Braxton, etc., v. The State*, 208 U. S. 192, are cited and apparently relied upon to support this proposition.

The law under which the plaintiffs in error were proposing to act was not a void law. The action which they were proposing to take was imposed upon them by §6944 Burns 1908, which section is part of the general election law of the state, has been in force since May 10, 1889, and is of unquestioned validity. (Brief for plaintiffs in error, p. 52. See, also, special finding of fact, p. 49.)

The contention of the defendant in error has been that the Act of 1911 was unconstitutional. This question has not been adjudicated for the reason that the Supreme Court had no power to adjudicate it, as is we think satisfactorily shown by Judge Morris' dissenting opinion. To treat that act as void is to evade the point in issue. It is perfectly well settled also that when the general assembly passes an act submitting the question to an electorate for final determination, the act is upon its passage, and is *in fieri* until it is voted upon and the result duly declared.

*State v. Thorson*, 68 N. W. 202;

*People v. Mills*, 70 Pac. 322;

*Threadgill v. Cross*, 26 Okla. 403, 109 Pac. 558;

Walton v. Develing, 61 Ill. 201;  
State, ex rel., v. Winnette, 78 Neb. 379, 110  
N. W. 1113.

It would be exactly as competent for the Supreme Court of Indiana to declare a bill for an act unconstitutional before it had been voted upon by either house of the General Assembly as to declare a proposition relating to elemental law unconstitutional before it has been submitted to the people, so that the proposition of defendant in error, so far as it includes the element of a void law, is without basis. So far as it contains an admission that officers having a duty to perform under a valid law have rights secured under the Federal Constitution which they may protect by litigation, it is correct.

There lies the distinction between defendant's claim and the cases which he cites. In *Smith v. State*, 191 U. S. 138, 148, the auditor refused to follow the command of the statute relative to certain mortgage exemptions, asserting that the statute was unconstitutional. The court held with great propriety that it did not lie with him to attack the constitutionality of the statute which in no wise affected him. The right to raise such questions rested, of course, with the persons injuriously affected thereby, who were not represented by the auditor. The same principle governed in the *Braxton County* case, 208 U. S. 192, but it is in no wise applicable to the facts presented in the case at bar.

Section 1 of Article 5 of the Constitution of Indi-

ana provides that "the executive powers of the state shall be vested in the governor." Section 16 of said Article further provides that "he (the governor) shall take care that the laws be faithfully executed." The constitution therefore conferred upon the governor the right, power and duty to see that the proposed new constitution was submitted to the voters of Indiana for adoption or rejection. The constitution having conferred the power and made it the duty of the governor to "take care that the laws be faithfully executed," it was his duty to take such steps in any proceeding instituted against him, either by appeal or writ of error, as are commensurate to the public trust and duties imposed upon him.

That he and his associates have authority to meet litigation and continue it to a final conclusion is essential to the continuance of government; otherwise, any kind of a judgment by any kind of a court in any kind of a case would result in permanently preventing the laws being enforced.

Norman v. Kentucky Bd. of Managers, 93  
Ky. 537, 18 L. R. A. 556, 557;

Barbour on Parties in Law and Equity, p  
106.



It is to be observed that defendant in error cites in this Court the overruled cases of

Governor v. Nelson, 6 Ind. 496;  
Baker, Governor, v. Kirk, 33 Ind. 517;  
Gray, Governor, v. State, 72 Ind. 567;  
*See, Hovey, Governor, v. State, 127 Ind.*  
528.

Respectfully submitted,

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MARSHALL, GOVERNOR OF THE STATE OF  
INDIANA, *v.* DYE.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 401. Argued October 23, 1913.—Decided December 1, 1913.

Where a board of public officials is a continuing body, notwithstanding its change of personnel, as is the case with the State Board of Elections of Indiana, the suit will be continued against the successors in office of those who ceased to be members of the board. *Murphy v. Utter*, 186 U. S. 95.

The enforcement of the provision in Article IV, § 4 of the Constitution, that the United States shall guarantee to every State in the Union a republican form of government, depends upon political and governmental action through the powers conferred on the Congress and not those conferred on the courts. *Pacific Telephone Co. v. Oregon*, 223 U. S. 118.

The claim that a judgment of the state court enjoining state officers from acting under a state statute declared to be unconstitutional denies to the State a republican form of government on account of the interference of the judicial department with the legislative and executive departments, does not present a justiciable controversy concerning which the decision is reviewable by this court.

The right of this court to review judgments of the state courts is circumscribed within the limits of § 709, Rev. Stat., now § 237, Judicial Code. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86.

Only those having a personal, as distinguished from an official, interest can bring to this court for review the judgment of a state court on the ground that a Federal right has been denied. *Smith v. Indiana*, 191 U. S. 138.

Whether the State Board of Elections shall submit a new state constitution to the electors of a State in accordance with a state statute, concerns the members of the board in their official capacity only, and a judgment of the state court that they refrain from so doing concerns their official and not their personal rights and this court will not review such judgment.

Writ of error to review 99 N. E. Rep. 1, dismissed.

THE facts, which involve the jurisdiction of this court to review a judgment of the state court at the instance of

231 U. S.

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a public official who has no personal interest in the litigation, are stated in the opinion.

*Mr. Frank S. Roby and Mr. Dan W. Simms*, with whom *Mr. Thomas M. Honan*, Attorney General of the State of Indiana, *Mr. James E. McCullough*, *Mr. Ward H. Watson*, *Mr. W. V. Stuart*, *Mr. E. P. Hammond*, *Mr. Sol H. Esarey* and *Mr. Elias D. Salsbury* were on the brief, for plaintiffs in error:

Under Art. 3, § 1, constitution of Indiana of 1851, the judicial department of the government is without power to direct, coerce, or restrain the executive (in which is included the administrative) department of the government; nor may the former exercise any of the functions of the latter. *State v. Noble*, 118 Indiana, 350; *Butler v. State*, 97 Indiana, 373, 376; *Frost v. Thomas*, 26 Colorado, 222; *Woods v. Sheldon*, Governor, 69 N. W. Rep. 602; *Sutherland v. Governor*, 29 Michigan, 320; *State v. Governor*, 25 N. J. Law, 331, 349; *State v. Lord*, 28 Oregon, 498; *Mississippi v. Johnson*, 4 Wall. 475; *Georgia v. Stanton*, 6 Wall. 50; *Decatur v. Paulding*, 14 Pet. 497; *Ex parte Ayres*, 123 U. S. 443; *Elliott v. Wiltz*, 107 U. S. 711; *Bates v. Taylor*, 3 L. R. A. 316; *Jonesboro v. Brown*, 8 Baxt. 490; *Vicksburg v. Lowry*, 61 Mississippi, 102; *In re Dennett*, 32 Maine, 508; 2 High on Injunction, § 1323; 1 Blackstone, \* 243; The Federalist, No. 43.

A judicial question cognizable by this court is involved in this case. For the distinction between judicial authority over justiciable controversies and legislative power as to purely political questions, see *Pacific States Co. v. Oregon*, 223 U. S. 118.

This court has jurisdiction of cases involving § 4, Art. IV of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Mississippi v. Johnson*, 4 Wall. 475.

Courts of the State have no power or jurisdiction over the Governor of the State to enjoin official action in any

case. *Rice v. The Governor*, 207 Massachusetts, 577, 579; *People v. Bissell*, 19 Illinois, 229; *The Governor and Supreme Court*, 243 Illinois, 9, 35; *People v. Hatch*, 33 Illinois, 9, 148; *People v. Cullum*, 100 Illinois, 472; *State v. Stone*, 120 Missouri, 428, 433; *Vicksburg R. Co. v. Lowry*, 61 Mississippi, 102, 103; *Hawkins v. The Governor*, 1 Arkansas, 570, 572, 575; *State v. Bisbee*, 17 Florida, 67, 78-83; *State v. Warmoth*, 22 La. Ann. 1; *State v. Warmoth*, 24 La. Ann. 351, 352; *Rice v. Austin*, 19 Minnesota, 103, 105; *Secombe v. Kittleson*, 29 Minnesota, 555, 561; *Mauran v. Smith*, 8 R. I. 192, 216; *In re Dennett*, 32 Maine, 508; *State v. Inspectors*, 114 Tennessee, 516; *Bates v. Taylor*, 87 Tennessee, 319, 325; *Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490; *Hovey v. State*, 127 Indiana, 588; *Beal v. Ray*, 17 Indiana, 554, 558; *State v. Huston*, 27 Oklahoma, 606, 611. See also *In re Opinion of Justices*, 208 Massachusetts, 610; Blackstone's Comm. \*243; *State v. Towns*, 8 Georgia, 360; *Sutherland v. Governor*, 29 Michigan, 320; *Chamberlain v. Silby*, 4 Minnesota, 309; *State v. Governor*, 25 N. J. Law, 331; *Hartranft's Appeal*, 85 Pa. St. 433.

The court had no power to interfere with the exercise of legislative discretion and its judgment is void. *Beauchamp v. State*, 6 Blackf. 299, 301; *Fry v. State*, 63 Indiana, 552, 559; *Levey v. State*, 161 Indiana, 251, 255; *LaFayette Co. v. Geiger*, 34 Indiana, 185, 198; *State v. McClelland*, 138 Indiana, 321, 335, 340; *Hedderich v. State*, 101 Indiana, 564, 567.

A power which is not distinctly either legislative, executive, or judicial, and is not by the constitution distinctly confided to a designated department of the government, must necessarily be under the control of the legislature. Cooley, Const. Law, p. 44; § 375, Jamieson's Const. Conventions (4th ed.), J. 362. See also *People v. Hill*, 36 L. R. A. 634, 636; *State v. Henley*, 39 L. R. A. 126, 132.

If the courts can add to the reserved rights of the people they can take them away. If they can mend, they can

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mar. If they can remove the landmarks which they find established, they can obliterate them. *Sharpless v. Mayor*, 21 Pa. St. 147; *State v. Menaugh*, 151 Indiana, 260, 267; *Cooley*, Const. Lim. (6th ed.), p. 200; *Burrows v. Delta Transp. Co.*, 106 Michigan, 582.

The judicial department of the government is without power to direct, coerce, or restrain the legislative department of the government; nor can the judicial department exercise any of the functions, or discharge, or prevent the discharge, of any of the functions of the latter. Cases *supra* and see § 1, Art. 3, Const. Indiana; *Smith v. Myers*, 109 Indiana, 1; *Langenberg v. Decker*, 131 Indiana, 471; *Wright v. Defrees*, 8 Indiana, 298, 303; *Ex parte Griffiths*, 118 Indiana, 83; *Carr v. The State*, 127 Indiana, 204, 208; *Hovey v. Noble*, 118 Indiana, 350; *Ex parte France*, 176 Indiana, 72; *Hanly v. Sims*, 175 Indiana, 345; *State v. Hawthorth*, 122 Indiana, 462; *McComas v. Krug*, 81 Indiana, 327; *Wilson v. Jenkins*, 72 N. Car. 5; *Goddin v. Crump*, 8 Leigh, 154; *Burch v. Earhart*, 7 Oregon, 58; *Franklin v. State Board*, 23 California, 177; *People v. Pecheco*, 27 California, 175; *Georgia v. Stanton*, 6 Wall. 50; *Decatur v. Paulding*, 14 Pet. 497; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *New Orleans Water Co. v. City of New Orleans*, 164 U. S. 471; *State v. Lord*, 28 Oregon, 498; *McChord v. Louisville &c. R. Co.*, 183 U. S. 483.

Under this decision a circuit court can confer more authority upon its bailiff than the Constitution has conferred upon both legislative and executive departments.

As to what constitutes a republican form of government, see *The Federalist*, No. 43; *Texas v. White*, 7 Wall. 700; 1 *Wilson's Works*, p. 366.

The executive could have disregarded the mandate of the Supreme Court in this case, but he could not adequately repel the attack made upon the republican government of Indiana under form of judicial decision. See *Smith v. Myers*, 109 Indiana, 1, 9.

Plaintiffs in error are citizens of the United States as well as citizens and officers of the State of Indiana. They are here representing the citizenship of the State of Indiana by virtue of authority conferred upon them to do so in a conventional and regular manner. Privileges and immunities of these citizens of the United States are abridged by the decision of the state court. *Slaughter House Cases*, 16 Wall. 36; *Crandall v. Nevada*, 6 Wall. 36.

It is the right of the people in a government, republican in form, to peaceably alter or abolish it and to institute a new government. Art. 1, § 1, Const. Indiana.

That decision prevents the performance of an act of extraordinary legislation by those alone who can perform it, upon the possible ground that the method followed is not in accordance with the procedure which the court regards as regular, although the course to be followed is a matter for the legislative body alone. This court has not failed at any time to protect delegated rights and to secure the benefit of such rights to those who are entitled thereto.

*Mr. Addison C. Harris*, with whom *Mr. Ralph K. Kane* was on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The case originated in a complaint filed in the Circuit Court of Marion County, Indiana, by John T. Dye, in which he alleged that he brought the suit for himself and other electors and tax-payers of the State of Indiana, the object of the suit being to enjoin the defendants, Thomas R. Marshall, Governor, Muter M. Bachelder and Charles O. Roemler, jointly composing the State Board of Election Commissioners, and Lew G. Ellingham, Secretary of State, from taking the steps required by statute to certify and transmit to the clerks of the several counties in the

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State a new constitution proposed by the legislature of the State and from printing and publishing a statement to be printed upon the ballots in such manner that the electors might indicate their choice as to such new constitution. Upon trial in the Circuit Court an injunction was granted. Upon appeal to the Supreme Court of the State of Indiana the judgment of the Circuit Court was affirmed. 99 N. E. Rep. 1. The case was then brought here by writ of error.

A motion was filed in this court on September 24, 1913, accompanied by an affidavit, stating the death of John T. Dye, defendant in error, and the appointment of Hugh Dougherty as his executor and his qualification as such in compliance with the laws of the State of Indiana and asking that he be permitted to appear and defend as such executor, which motion is granted.

There was also submitted on October 14, 1913, a motion to substitute Samuel M. Ralston, Governor, and Will H. Thompson and John E. Hollett, members of the State Board of Election Commissioners, of the State of Indiana, as plaintiffs in error. As the judgment in this case was against the defendants Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, composing the State Board of Election Commissioners, and their successors in office, and as such Board is a continuing board (§ 6897, 2 Burns Annotated Indiana Statutes, 1908), notwithstanding its change of personnel, this motion is within the principle laid down in *Murphy v. Utter*, 186 U. S. 95, and is granted. See also *Richardson v. McChesney*, 218 U. S. 487, 492, 493. Lew G. Ellingham, Secretary of State, is one of the plaintiffs in error and the judgment sought to be reviewed ran against him as such Secretary of State, and he still occupies that office.

The statute (Acts of 1911, p. 205) under which it was proposed to submit the new constitution of the State, provided for its submission at the general election in

November, 1912, and required the election officials and other officers to perform like duties to those required at general elections, with a view to the submission of such questions. The Supreme Court sustained the contention that the act was void under the state constitution, holding in substance that the act of 1911 was unconstitutional for want of authority in the legislature to submit an entire constitution to the electors of the State for adoption or rejection, and that, if the instrument could be construed to be a series of amendments, it could not be submitted as such for the reason that Article 16 of the constitution of the State requires that all amendments to the state constitution shall, before being submitted to the electors, receive the approval of two general assemblies, which was not the case here, and that Article 16 further provides that while an amendment or amendments to the constitution which have been agreed upon by one general assembly are awaiting the action of a succeeding general assembly or of the electors, no additional amendment or amendments shall be proposed, and that as a matter of fact another amendment was still awaiting the action of the electors.

The contention mainly urged by the plaintiffs in error of the denial of Federal rights is that the judgment below is in contravention of Article IV, § 4, of the Constitution of the United States, which provides that the United States shall guarantee to every State in the Union a republican form of government. In *Pacific Telephone Co. v. Oregon*, 223 U. S. 118, this court had to consider the nature and character of that section, and held that it depended for enforcement upon political and governmental action through powers conferred upon the Congress of the United States. The full treatment of the subject in that case renders further consideration of that question unnecessary, and the contention in this behalf presents no justiciable controversy concerning which the decision is



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reviewable in this court upon writ of error to the state court. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 314. And as to all questions said to be of a Federal character, although the judgment of the Supreme Court was rested solely upon its interpretation of the state constitution, the rulings are assailed because of alleged wrongs done to the plaintiffs in error in their official capacity only.

We have had frequent occasion to declare that the right of this court to review the judgment of the highest court of a State is circumscribed within the limits of § 709 of the Revised Statutes, now § 237 of the Judicial Code. See *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, and cases there cited. Among the limitations upon this right is the principle which requires those who seek to bring in review in this court the judgment of a state court to have a personal as distinguished from an official interest in the relief sought and in the Federal right alleged to be denied by the judgment of the state court. This principle was laid down in *Smith v. Indiana*, 191 U. S. 138, in which it was held that the auditor of a county of the State of Indiana could not upon writ of error to this court have the judgment of the Supreme Court of Indiana declaring an exemption law of that State valid and the performance of its provisions obligatory upon him reviewed upon the ground that the act was repugnant to the Federal Constitution. The court, Mr. Justice Brown delivering the opinion, said (p. 149):

"It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz.,

the taxpayers, and in this particular the case is analogous to that of *Caffery v. Oklahoma*, 177 U. S. 346. We think the interest of an appellant in this court should be a personal and not an official interest, and that the defendant, having sought the advice of the courts of his own State in his official capacity, should be content to abide by their decision."

In *Braxton County Court v. West Virginia*, 208 U. S. 192, it was held that, where the Supreme Court of West Virginia had compelled a county court by mandamus to lower its assessment so that it would be within the limit designated by a certain statute, this court would not entertain a writ of error to review the judgment of the state court, although the plaintiff in error had set up that the assessment contended for would not provide a sufficient amount to pay the expenses of the county, part of which it was alleged had by contract attached before the statute in question was passed. Speaking for the court, Mr. Justice Brewer said, (p. 197):

"That the act of the State is charged to be in violation of the National Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in and affected adversely by the decision of the state court sustaining the act, and the interest must be of a personal and not of an official nature. *Clark v. Kansas City*, 176 U. S. 114, 118; *Lampasas v. Bell*, 180 U. S. 276, 283; *Smith v. Indiana*, 191 U. S. 138, 148."

In the present case the Supreme Court of the State has enjoined the plaintiffs in error as officers of the State from taking steps to submit the proposed constitution to the electors of the State, because in its judgment the act of the legislature of the State requiring such submission was in violation of the state constitution. Whether this duty

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shall or shall not be performed concerns the plaintiffs in error in their official capacity only. The requirement that they refrain from taking such steps concerns their official and not their personal rights. Applying the rule established by the previous decisions of this court, it follows the judgment of the state Supreme Court is not reviewable here, as it is not alleged to violate rights of a personal nature, secured by the Federal Constitution or laws.

It therefore follows that this writ of error must be

*Dismissed.*